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IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October Term, 1983

RICKY RAY RECTOR.....Petitioner

vs.

STATE OF ARKANSAS.....Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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QUESTIONS PRESENTED

I. WHETHER THE REFUSAL OF THE SUPREME COURT OF ARKANSAS TO COMPARE PETITIONER'S DEATH SENTENCE, TAKING INTO ACCOUNT PETITIONER'S PRESENT MENTAL CONDITION, RESULTED IN A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PER FURMAN V. GEORGIA?

II. WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A JURY COMPOSED BY A CROSS-SECTION OF THE COMMUNITY AND PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY WHICH IS NOT "GUILT PRONE" WERE VIOLATED BY THE STATE'S ACT OF DEATH-QUALIFYING THE JURY WHICH DETERMINED PETITIONER'S GUILT OR INNOCENCE?

III. WHETHER REQUIRING PETITIONER TO STAND TRIAL IN A CAPITAL CASE, GIVEN HIS MENTAL CONDITION, WAS A VIOLATION OF THE FOURTEENTH AMENDMENT?

IN THE SUPREME COURT

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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Petitioner, Ricky Ray Rector, a prisoner facing death by electrocution in the Arkansas electric chair, petitions for a writ of certiorari to review the affirmance of his conviction and sentence by the Supreme Court of Arkansas.

OPINION BELOW

This petition is a direct request for review of the affirmance of the trial court judgment and sentence in this case by the Supreme Court of Arkansas. The only opinion of the Supreme Court of Arkansas is reported in Rector v. State, 280 Ark. 385 (October 17, 1983). A copy of the opinion is included in the appendix.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on October 17, 1983. Petitioner filed a timely motion for

rehearing. The motion for rehearing was denied on November 21, 1983.

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3), with Petitioner asserting here, and having asserted below, a deprivation of rights secured by the Constitution of the United States made applicable to the States through the Due Process Clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sixth Amendment, United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, ..."

Eighth Amendment, United States Constitution:

"...nor cruel and unusual punishments inflicted."

Fourteenth Amendment, United States Constitution:

"Section 1. ... nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ark. Stat. Ann. §41-1301:

"The following procedures shall govern trials of persons charged with capital murder:

(1) The jury shall first hear all evidence relevant to the charge or charges and shall then retire to reach a verdict of guilt or innocence.

(2) If the defendant is found not guilty of the capital offense charged, but guilty of a lesser included offense, sentence shall be determined and imposed as provided by law.

(3) If the defendant is found guilty of capital murder, the same jury shall sit again in order to hear additional evidence as provided by subsection (4) hereof, and to determine sentence in the manner provided by section 1302 (§41-1302); except that, if the state waives the death

penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, no such hearing shall be required, and the trial court shall sentence the defendant to life imprisonment without parole.

(4) In determining sentence, evidence may be presented to the jury as to any matters relating to aggravating circumstances enumerated in section 1303 (§41-1303), or any mitigating circumstances. Evidence as to any mitigating circumstances may be presented by either the state or the defendant regardless of its admissiblity under the rules governing admission of evidence in trials of criminal matters; but the admissibility of evidence relevant to the aggravating circumstances set forth in section 1303 (§41-1303) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant or his counsel shall be permitted to present argument respecting sentencing. (Acts 1975, No. 280, §1301, p. 500.)"

Ark. Stat. Ann. §41-1501(1):

"A person commits capital murder if:

(b) with the premeditated and deliberated purpose of causing the death of any law enforcement officer, jailer, prison official, fireman, judge or other court official, probation officer, parole officer, or any military personnel, when such person is acting in line of duty, he causes the death of any person;"

STATEMENT OF THE CASE

On March 22, 1981, Petitioner shot three persons at Tommy's Restaurant in Conway, Faulkner County, Arkansas. One of the persons was killed. Petitioner was charged with murder and two counts of first degree battery. On March 24, 1981, Officer Robert Martin of the Conway Police Department went to the home of Petitioner's mother to arrest Petitioner. There in the presence of three witnesses Petitioner shot Officer Martin twice with a .38 caliber pistol. Petitioner then walked outside the house and shot himself through the head. Officer Martin died at the scene.

On the night of March 24, 1981, surgeons at the University of Arkansas School of Medicine in Little Rock performed a

debridgement upon Petitioner. The effect of the operation was that of a pre-frontal lobotomy.

On March 25, 1981, as a result of the shooting of Officer Martin, Petitioner was charged with capital murder committed in violation of Ark. Stat. Ann. §41-1501(1)(b)(Repl. 1977).

Petitioner was tried to a jury in Faulkner Circuit Court on the first degree murder and battery charges. He was convicted and sentenced to life imprisonment plus 40 years imprisonment. This conviction was affirmed by the Arkansas Supreme Court in Rector v. State, 277 Ark. 17, 638 S.W.2d 672 (1982).

After the convictions for first degree murder and battery were affirmed Petitioner was tried to a jury for capital murder. Trial was held November 8 through November 10, 1982. Petitioner was convicted and sentenced to death. The conviction was affirmed by the Arkansas Supreme Court in Rector v. State, 280 Ark. 385 (October 17, 1983).

Prior to both trials, Petitioner had filed motions alleging he was incompetent to stand trial. Extensive hearings were held on these motions on September 28, 1981, and October 25, 1982. The evidence adduced at the first hearing was made a part of the record at the second hearing. Prior to the trial of capital murder, Petitioner moved that the jury which determined his guilt/innocence not be death-qualified. The motion was denied.

On appeal Petitioner argued that given his brain injury the Arkansas Supreme Court should compare death sentences and reduce Petitioner's capital conviction to life without parole.

From the rulings of the Arkansas Supreme Court that (1) Petitioner was competent to stand trial; (2) Petitioner was not constitutionally entitled to two juries; and (3) there was necessity that the Arkansas Supreme Court compare death sentences

taking into account Petitioner's current condition, Petitioner brings this Petition for Writ of Certiorari and asks that the Court vacate his conviction and sentence.

REASONS FOR GRANTING THE WRIT

I.

THE REFUSAL OF THE SUPREME COURT OF ARKANSAS TO COMPARE PETITIONER'S DEATH SENTENCE, TAKING INTO ACCOUNT PETITIONER'S PRESENT MENTAL CONDITION, RESULTED IN A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PER FURMAN V. GEORGIA.

On June 29, 1972, this Court decided Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). In response to Furman most states amended their death penalty statutes in an effort to develop constitutionally permissible death penalty procedures. Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909 (1976), Footnote 23. Two basic procedures were adopted. Some states attempted to set detailed requirements for jury and judicial actions in death cases. Some states made the death penalty mandatory in certain cases. The Arkansas Legislature detailed jury procedure in capital cases but made no reference to differing judicial duties in capital cases. Ark. Stat. Ann. §41-4706.

On July 2, 1976, this Court decided five cases where the new death penalty statutes were at issue. Three cases where the statutory scheme was similar to that in Arkansas were affirmed. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 49 L.Ed.2d 859 (1976). Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Zurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). Two cases where the death penalty was mandatory was reversed. Woodson and Waxton v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). Roberts v.

Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The Arkansas Supreme Court was ordered to reconsider the case of Carl Albert Collins in light of these five cases.

In Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977), the Arkansas Supreme Court, in a 4-3 decision, determined that the Arkansas statute came within the perview of Gregg, Proffit and Zurek and hence was constitutional. The Arkansas Supreme Court recognized that the Gregg mandate could be satisfied only where judicial review determined whether the jury imposition of the death sentence is arbitrary and capricious. This recognition was well-founded. In Gregg, the plurality stated:

> "As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases. §27-2537(c) (Supp. 1975)."
>
> ...
>
> "Finally, the Georgia statute has an additional provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. The new sentencing procedures require that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and 'whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' §27-2537(c)(3) (Supp. 1975) Footnote 56. In performing its sentence-review function, the Georgia court has held that 'if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.' Coley v. State, 231 Ga., at 834, 204 S.E.2d, at 616. The court on another occasion stated that 'we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally...' Moore v. State, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975). See also Jarrell v. State, supra, 234 Ga., at 425, 216 S.E.2d, at 270 (standard is whether 'juries generally throughout the state have

> imposed the death penalty'); Smith v. State, 236 Ga. 12, 24, 222 S.E.2d 308,318 (1976) (found 'a clear pattern' of jury behavior)."

In Collins v. State, the issue whether the Arkansas Supreme Court was authorized and equipped to review death sentences as required by Gregg was hotly contested. Three dissenting justices of the Arkansas Supreme Court argued that the Arkansas statute did not provide the Georgia safeguards.

From this beginning the Arkansas Supreme Court commenced review of jury imposition of the death penalty to determine whether that imposition was arbitrary and capricious. This review was made by taking an overall view of the facts and comparing with jury findings in similar cases. As stated by Justice Hickman, one of the dissenters in Collins, in his concurring opinion in Henry v. State, 278 Ark. 478, 647 S.W.2d 419 (1983):

> "...In Collins, we abandoned the notion there must be a legal mistake in order to reduce a sentence in a death case. We made a pact, so to speak, that we would, on our own, make certain the death penalty was not the result of passion, prejudice or excessive under the circumstances. We have to keep that pact as a matter of integrity."

Petitioner has been unable to locate any capital case since Collins where the Arkansas Supreme Court has expressly refused to review jury imposition of the death penalty. In refusing to determine whether Petitioner's death penalty should be imposed, the Arkansas Supreme Court stated:

> "Finally, it is argued that upon comparing this case with other capital cases we should reduce the penalty to a life sentence without parole. When we consider that in a period of two days Rector killed one man, for which he was convicted of murder, committed aggravated assaults upon two others, and then deliberately shot a police officer who had done nothing to provoke an attack, we find nothing arbitrary in this death sentence as compared to our cases.

> Counsel insist, however, that because Rector's self-inflicted brain injury had substantially the same effect as a frontal lobotomy, causing him to be mildly retarded mentally and to be somewhat unemotional, the State of Arkansas should not permit the execution of a person in that condition. This case differs, however, from Giles v. State, 261 Ark. 413, 549 S.W. 2d 479 (1977), cert. denied 434 U.S. 894, in that there the jury arbitrarily disregarded an impaired mental condition that existed when the crime was committed, which led us to reduce the sentence. Here Rector had no such mental impairment until he attempted suicide after the crime - facts that were before the jury. In our opinion such circumstances arising after the crime affect the matter of clemency and should properly be addressed to the Governor, who has the facilities for investigating all the facts. Although we may reduce a death sentence to life without parole, and have done so in the past, that action is taken as a matter of law, not as an act of clemency."

Petitioner recognizes that this is an unusual case in that the injury, which resulted in Petitioner's current condition, occurred shortly after Officer Martin was shot. However, the self-inflicting of the wound was part of the same incident. It occurred within seconds after Officer Martin was shot. Petitioner submits that this factor in no way justifies the refusal of the Arkansas Supreme Court to consider Petitioner's current condition in determining whether the death penalty should be imposed. The refusal to review imposition of the death sentence renders Arkansas' death penalty statute unconstitutional as being in violation of the Eighth and Fourteenth Amendments of the Federal Constitution. Both this Court and the Arkansas Supreme Court have recognized that absent some judicial determination whether the jury's action was arbitrary and capricious, the death sentence cannot be imposed. Here the Arkansas Supreme Court has expressly refused to consider whether the jury's imposition of the death sentence upon one in Petitioner's condition violates the Eighth and Fourteenth Amendments. The Arkansas Supreme Court is expressly refusing to compare Petitioner's death sentence, taking into account Petitioner's condition which was created as a part of the same incident resulting in the death of Officer Martin. Absent the judicial review promised by the Arkansas Supreme Court in Collins

there is no determination whether the jury's action was arbitrary and capricious. Hence, the mandate of Gregg, recognized by the Arkansas Supreme Court in Collins, has been ignored.

The Arkansas Supreme Court's opinion assumes Petitioner sought clemency in that Court. Petitioner did not seek clemency. Petitioner sought that the Arkansas Supreme Court Court determine whether the death penalty, as a matter of law, should be imposed upon Petitioner. The issue squarely presented to the Arkansas Supreme Court was whether imposition of the death penalty upon Petitioner was cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. This was a question of law for the Court, not a question of mercy for the Governor. Yet, the Arkansas Supreme Court expressly refused to address this issue and abandoned Collins. By abandoning Collins the Arkansas Supreme Court rendered the Arkansas death penalty statute unconstitutional under the Gregg mandate.

The Arkansas Supreme Court reasoned that the issue should be one of clemency for the Executive since the Executive has methods of investigation not available to the Court. This argument fails for two reasons. First, this problem should have prevented the Arkansas Supreme Court from taking the position it took in Collins if the problem was to be determinative. It is not a reason for abandoning Collins, and hence Gregg, in midstream. Secondly, the facts were available to the Arkansas Supreme Court. Nine expert witnesses, psychiatrists, psychologists or other specialists, testified regarding Petitioner's mental condition. Two of these persons testified twice. Also, various lay witnesses testified regarding Petitioner's condition. How can it be said that the facilities for investigation are needed when this mountain of testimony is before the Court?

Petitioner respectfully submits that a conflict exists between the Arkansas Supreme Court and this Court. This conflict

clearly justifies the granting of certiorari in this matter.

II.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A JURY COMPOSED BY A CROSS-SECTION OF THE COMMUNITY AND PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY WHICH IS NOT "GUILT PRONE" WERE VIOLATED BY THE STATE'S ACT OF DEATH-QUALIFYING THE JURY WHICH DETERMINED PETITIONER'S GUILT OR INNOCENCE.

On August 5, 1983, the Federal District Court for the Eastern District of Arkansas issued its opinion in Grigsby v. Mabry, 483,F.Supp. 1372 (E.D.Ark., August 5, 1983). In a 91 page opinion the chief judge for the Federal District Court reviewed law, evidence and history of the death penalty in Arkansas. The Federal District Court concluded that the present Arkansas procedure in death cases is unconstitutional for two reasons. First, the Sixth and Fourteenth Amendment right to a jury drawn from a cross-section of the community was not being granted. Secondly, the Sixth and Fourteenth Amendment right to a fair trial was being violated since the jury selection process resulted in selection of a "guilt prone" jury. The district judge ruled after an extensive evidentiary hearing which had been ordered by the Eighth Circuit Court of Appeals. In Grigsby v. Mabry, 637 F.2d 525 (1980), the Eighth Circuit held:

> "The record demonstrates that Grigsby did not receive a full and fair evidentiary hearing in state court on three factual issues: (1) whether death-qualified jurors are more likely to convict than jurors selected without regard for their views on the death penalty, (2) whether death-qualified jurors are more likely to convict of a higher degree of murder than jurors selected without regard for their death penalty views, and (3) whether the jurors in this case were in fact death-qualified. These questions must be answered because if they are answered in the affirmative, Grigsby has made a case that his constitutional rights

have been violated and he would be entitled to a new trial."

On September 7, 1983, this case was argued before the Arkansas Supreme Court. On October 17, 1983, the Arkansas Supreme Court rendered its opinion which is almost entirely a scathing rebuttal to the opinion of the Federal District Court in Grigsby. Obviously, an empasse has been reached between the Federal District Court and the Arkansas Supreme Court. It should be noted that in light of the language used by the Eighth Circuit Court in its remand to the Federal District Court this conflict extends to one between the Arkansas Supreme Court and the Eighth Circuit Court of Appeals. Obviously, the empasse between the Federal District Court and the Arkansas Supreme Court has reached the point that the basic issues in this important matter have been clearly and forcefully articulated.

It should be noted that this conflict now exists between the Federal Circuit Courts of Appeal. The Fifth Circuit, as cited by the Arkansas Supreme Court, has found a procedure similar to the one used in Arkansas constitutional. See Spinkellink v. Wainwright, 578 F.2d 582 (5th Circuit 1978) and Smith v. Baleom, 660 Fed.2d 573 (5th Circuit 1981). This directly contradicts the Eighth Circuit holding that if Grigsby proved the points alleged he had made a case for a constitutional violation.

Surely the issue is ripe for a decision by this Court. There is a conflict between the Circuit Courts of Appeal. There is a bitter conflict between the Federal District Court in Arkansas and the Arkansas Supreme Court. Cases are regularly being tried where neither court nor attorney knows whether the procedure being used is constitutional. These matters will be routinely presented by habeas corpus to the Federal District Court after a decision by the Arkansas Supreme Court upholding the procedure. Petitioner respectfully submits that the time has come for this

Court to resolve this important, fundamental issue.

III.

REQUIRING PETITIONER TO STAND TRIAL IN A CAPITAL CASE, GIVEN HIS MENTAL CONDITION, WAS A VIOLATION OF THE FOURTEENTH AMENDMENT.

Because of Petitioner's self-inflicted gunshot wound and subsequent surgical procedure, Petitioner's ability to stand trial was brought into issue. The State first had Petitioner examined by Dr. Mary Kaczenski. Dr. Kaczenski found that Petitioner was not competent to stand trial as a result of amnesia, loss of emotional reactivity and loss of motivation. She found lack of fringing memory loss or malingering and that Petitioner's responses were typical of one who had a total frontal lobotomy. The State did not accept its own expert's opinion but rather had Petitioner examined by others, who concluded Petitioner was competent to stand trial. Petitioner's expert witnesses concluded Petitioner was not competent to stand trial.

This Court has held that the states must have and use procedures to determine whether a defendant is competent to stand trial. A state's failure to do so deprives a defendant of due process. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15L.Ed.2d 815 (1976); Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 869, 43L.Ed.2d 103 (1975). Petitioner was not deprived of due process as a result of the State's failure to use an adequate procedure to determine whether Petitioner was competent to stand trial. Rather, the State used a system fair on its face to determine whether Petitioner was competent. The State, however, perverted this system so that by going through the motions the lack of substantive due process would be hidden in the appearance of procedural due process. The State did locate expert witnesses at

the Arkansas State Hospital who testified Petitioner was competent at the time of trial. But the State refused to accept the finding of its own expert as well as an expert at the University of Arkansas Medical Center. In effect the State of Arkansas shopped for experts until it found someone who would report that Petitioner was competent to stand trial. This Court should grant certiorari to determine the important issue whether the State's actions constitute a violation of the due process clause of the Fourteenth Amendment.

CONCLUSION

The constitutional violations which have occurred in this case raise three important issues which should be decided by this Court. For this reason the petition for writ of certiorari should be granted and the matter set for briefing and argument. Petitioner's conviction and sentence should be set aside, and the matter remanded to the Arkansas Courts for retrial.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Clarence Daniel Stripling, counsel for petitioner herein, do hereby certify that a sufficient number of true and correct copies of the foregoing petition and accompanying appendix have been served on opposing counsel this Sixth day of January, 1984, by mailing said copies, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas, 72201.

Clarence Daniel Stripling

APPENDIX "A"

RICKY RAY RECTOR

vs. No. CR83-39

STATE OF ARKANSAS

Supreme Court of Arkansas
Opinion delivered October 17, 1983

GEORGE ROSE SMITH, Associate Justice. Ricky Ray Rector was charged with capital murder in the shooting of Bob Martin, a Conway city policeman acting in the line of duty. Ark. Stat. Ann. §41-1501(1)(b) (Repl. 1977). In a bifurcated trial the jury returned a verdict of guilty and imposed the death penalty. Nine separate points for reversal are argued. Counsel state with commendable candor that several other possible points are not being urged, for want of merit. We affirm the judgment.

The first stage of the trial was brief, the facts being essentially undisputed. On march 22, 1981, Rector, age 28, shot and killed Arthur Criswell at a restaurant in Conway and wounded two other men. For two days the police searched for Rector. On the afternoon of March 24 Officer Martin, in uniform, went to the home of Rector's mother, in Conway. While the officer was talking to Rector's mother, sister, and nephew, Rector entered the back of the house and came into the living room. Rector and the officer knew each other and may have exchanged a few words of greeting. Within a few minutes Rector, who had not joined in the conversation, drew a pistol and shot Officer Martin twice. Rector left by the back door and said to his nephew's wife, whom he met crossing the yard: "I just shot that cop." A few moments later Rector attempted suicide by shooting himself in the forehead, the bullet entering the front part of his brain. That evening the wound was surgically cleaned and closed.

Among the points for reversal, we first consider the argument that death-qualified juries are unconstitutional. That question was left open in Witherspoon v. Illinois, 391 U.S. 510 (1968), because the Court found the evidence too tentative and fragmentary to support a firm conclusion. We do not take that disposition of the issue to carry an implication that the Court would necessarily have disapproved death-qualified juries if the proof had been complete.

Since Witherspoon the state courts have uniformly upheld the validity of death-qualified juries. (The force of our own cases is conceded by the appellant, who asks that they be overruled.) The federal courts of appeal, however, are not in agreement. In the Seventh Circuit the court left the question open in 1976, finding the proof still inconclusive. United States ex rel. Clark v. Pike, 538 F.2d 750 (7th Cir. 1976). In the Fifth Circuit the court assumed, without deciding, that death-qualified jurors are prone to convict, but the court nevertheless upheld the death-qualified jury. Its reasoning was in part that a juror implacably opposed to capital punishment might choose to hang the jury even in the fact of overwhelming proof, with the possibility that a succession of such mistrials could defeat the State's attempts to enforce its death penalty. Spinkellink v. Wainwright, 578 F. 2d 582 (5th Cir. 1978), followed with further discussion in Smith v. Balkcom, 660 F. 2d 573 (5th Cir. 1981).

In our circuit, the Eighth, the court has apparently interpreted Witherspoon to mean that if death-qualified juries had then been shown to favor the prosecution, the Supreme Court would have prohibited such juries. Grigsby v. Mabry, 637 F. 2d 525 (8th Circ. 1980). We so understand the Grigsby opinion simply because the majority, without discussing the issue on its merits, flatly stated that if it can be shown that death-qualified juries are more likely to convict, "Grigsby has made a case that his

constitutional rights have been violated and he would be entitled to a new trial." The case was accordingly remanded to the Arkansas district court to allow it to determine as a question of fact whether death-qualified juries are prone to convict.

The Grigsby opinion, remanding the case, was delivered on November 18, 1980. The district court completed its evidentiary hearing in July, 1981. The district court then delayed the case for more than two years, with Chief Judge Eisele finally issuing a 91-page opinion on August 5, 1983, declaring death-qualified juries to be unconstitutional. Grigsby v. Mabry, ___F. Supp. __ (E.D. Ark. 1983). Since that opinion is the first one not only examining the factual issues in detail but also banning the death-qualified jury, we have thought it best to re-examine the issue in the light of that opinion.

At the outset we must clear the air by commenting on a ten-page analysis in the district court's Grigsby opinion, purportedly tracing the history of jury selection in capital cases in Arkansas and criticizing this court for its recent decisions in that field of law. Manuscript opinion, pp. 71-81. The district judge evolved a theory (based on our decision in Atkins v. State, 16 Ark. 568 (1855), and on an 1869 statute permitting a challenge for implied bias if a juror had such conscientious opinions as would preclude him from finding the defendant guilty, Ark. Stat. §43-1920 (Repl. 1977) that the Arkansas law originally permitted a challenge for cause only if the venireman could not find the defendant guilty, regardless of the venireman's attitude about the death penalty. The opinion, noting that our later cases permit the challenge if the venireman cannot impose the death penalty, then puts the question: "When and how did the Arkansas law change?"

The court answers its own question by concluding that

between 1968 and 1970, and in response to the ruling in Witherspoon:

> (The Arkansas Supreme Court) decided to no longer adhere to the limitation and exclusion of jurors as provided by the statute. Instead, it decided that if a juror could never vote to impose the death penalty, he could be excluded altogether. No inquiry apparently had to be made as to whether the juror was nevertheless capable of rendering a fair and impartial verdict upon the guilt or innocence of the defendant. . . .
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> . . . .
>
> The bottom line of this analysis is that prior to Witherspoon, Arkansas focused on the most traditional and accepted of voir dire inquiries: whether a prospective juror's scruples would preclude him from rendering a verdict of guilty and the court relied directly on the legislatively mandated language. After Witherspoon, the court no longer relied on the exclusion statute but simply adopted Witherspoon as the predicate for a judicially established Arkansas rule that allowed the exclusion of prospective jurors from the guilt-innocence phase on the ground that they could never impose the death penalty if called upon to assess a penalty. (District Court's italics.)

There is more to the same effect.

The district judge's decidedly critical analysis of our cases would be disturbing if it were not so readily apparent that the analysis and criticism are totally and demonstrably wrong. Our decision in Atkins did not even remotely contemplate that a jury might first find a defendant guilty of a capital offense and then select or reject the death penalty. The simple fact, evidently unknown to the district court in Grigsby, is that from statehood until 1915 the death penalty was mandatory in all capital cases, the jury taking no part in fixing the penalty. Rev. Stat., ch. 44, div. 3, art. 1, §7 (1837). That was of course true in 1869, when the implied bias provision was enacted. As reflected by scores of appellate records in the state's archives, the usual guilty verdict was: "We, the jury, find the defendant guilty of first-degree murder, as charged in the indictment." That ended the trial, with the jury being discharged and the court entering the judgment as fixed by law.

Thus this court did not change its position in response to Witherspoon. We changed a half century earlier, to give effect to the 1915 statute which for the first time recognized life imprisonment as a permissible sentence in Arkansas and made it an alternative punishment in all capital cases. Ark. Stat. Ann. §43-2153. All this was fully explained almost twenty years before Witherspoon when we said in Needham v. State, 215 Ark. 935, 224 S.W.2d 785 (1949):

> During the selection of the jury the prosecuting attorney was permitted to ask each juror if he had any conscientious scruples against the imposition of the death penalty. The statute defines implied bias as including such conscientious opinions as would preclude the juror from finding the defendant guilty of an offense punishable by death. Ark. Stats. (1947), §43-1920. It is argued that the State should have been allowed to inquire only whether the juror's conscience would preclude his finding the defendant guilty, thereby permitting the service of jurors who would vote for a verdict of guilty but approve only the alternative penalty of life imprisonment. The history of our statutes rebuts this suggestion. When the statute defining implied bias was enacted the death penalty was mandatory; so it was then sufficient for the legislature to refer merely to a finding of guilt, the punishment following as a matter of course. Not until 1915 did the legislature give the jury the option of imposing life sentences in capital cases. Ibid., §43-2153. The legislature evidently meant for the jury to exercise its discretion in selecting the punishment, but it is obvious that a juror can exercise no discretion if his conscience does not permit him to vote for the death penalty in any case. The statutory history in Idaho has been identical with our own, and there it is held proper for the State to inquire whether a juror has scruples against capital punishment. State v. Wilson, 41 Idaho 616, 243 P. 359. Among many other cases approving this inquiry when the jury in its discretion may impose a life sentence are: Shank v. People, 79 Colo. 576, 247 P. 559; State v. Leuch, 198 Wash. 331, 88 P. 2d 440; State v. Favorito, 115 N.J.L. 197, 178 A. 765.

We do find it bewildering that the Grigsby opinion, at page 80, quoted the very next paragraph in the Needham opinion without attaching any weight to what had just preceded it.

The federal trial court invalidated the death qualification of jurors on two grounds: "first, it denies the accused a trial by a jury representative of a cross-section of the community; and

second, it creates juries that are conviction-prone." In the trial of the case at bar those grounds were relied upon in Rector's motion for a bifurcated trial with two juries. That motion was supported by a stipulation, agreed to by the prosecution, that Dr. Robert M. Berry is an expert in the area and would testify in conformity with his recent article, Death-Qualification and the "Fireside Induction", 5 UALR L.J. 1 (1982). The trial judge overruled Rector's motion.

We need consider only the federal court's second finding, that conviction-prone juries are for that reason unconstitutional, because if the state has a significant interest that justifies the exclusions inherent in the death-qualification process, it is immaterial that the excluded veniremen might be considered to be a distinctive group in the community. Duren v. Missouri, 439 U.S. 357 (1979).

For this discussion we assume, as did the court in Spinkellink, that death-qualified jurors are more prone to convict than those excluded under Witherspoon. The question, then, is this: Should jurors unalterably opposed to capital punishment be permitted to participate in the determination of guilt or innocence in capital cases? We are firmly of the view that their exclusion is proper, for either of two reasons.

First, we cannot regard conviction-proneness either as inherently wrong or as destructive of the juror's impartiality. In the various studies on the subject there is almost uniformly an undercurrent of thought, not expressed but easily sensed, that jurors who believe in the death penalty are by their nature barbarians in modern society. That view certainly condemns most Americans. The Arkansas General Assembly, in common with the legislatures in at least two thirds of the other states, re-enacted a death-penalty statute after the Supreme Court struck down all such laws in 1972. Needless to say, we as judges are

under a duty to respect and give effect to the laws made by the people or their representatives, no matter what our personal beliefs might be.

We have no reason to doubt that any tendency of a particular juror, not inflexibly opposed to the death penalty, to lean toward conviction in capital cases arises from one of the most deeply rooted feelings in human nature: an instinctive urge to condemn injustice. That urge, depending upon the comparative atrociousness of the particular offense, may vary from resentment to indignation, then to anger, and finally to outrage. It cannot be expected that a juror's ability to reason with complete detachment will be wholly unaffected by such an uncontrollable reaction of human nature to shocking injustice.

Human nature is not unconstitutional. From the earliest days of the common law, which ultimately created the jury system now embedded in our constitutions, the human urge to redress manifest wrongs played its part in the development of the criminal law. Justice Holmes, in tracing that development, pointed out that there are many crimes with respect to which the wrongdoer cannot be forced by the law to compensate the principal sufferer, as in the case of murder or manslaughter. Holmes then went on to show how, in that stipulation, punishment of the wrongdoer becomes necessary:

> In all these cases punishment remains an alternative. A pain can be inflicted upon the wrongdoer, of a sort which does not restore the injured party to his former situation, or to another equally good, but which is inflicted for the very purpose of causing pain. . . . The prisoner pays with his body.
>
> The statement may be made stronger still, and it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. This is the opinion, at any rate, of two authorities so great, and so opposed in other views, as Bishop Butler and Jeremy Bentham. . . .

> The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution. At the same time, this passion is not one which we encourage, either as private individuals or as law-makers. Moreover, it does not cover the whole ground. There are crimes which do not excite it, and we should naturally expect that the most important purposes of punishment would be coextensive with the whole field of its application. (O. W. Holmes, The Common Law, pp. 40-42 [1881].)

As Holmes implied, some crimes do not excite the feeling of outrage in law-abiding citizens, but such lesser offenses are not punishable by death. Capital offenses characteristically comprise the most atrocious of crimes: the murder of helpless victims of rape or robbery and the murder of law enforcement officers, who stand in their line of duty between the ordinary citizen and the ruthless criminal. We may ask, why should the most cowardly and contemptible of criminals, merely by reason of the viciousness of their crimes, be favored in jury selection to a greater degree than any other accused person or any litigant in a civil case? The studies opposing death-qualified juries present no answer to that inquiry.

One would expect the most upright and moral veniremen to be the ones most deeply outraged by the type of crime for which the prosecution seeks the death penalty. Must we say that a jury composed of such veniremen cannot be regarded as impartial? On this point a clear indication of legislative policy is to be found in the federal and Arkansas statutes excluding convicted felons from jury service. 28 U.S.C. §1865; Ark. Stat. Ann. §39-102 (Supp. 1983). Unquestionably that exclusion is intended to bar from the jury box the one class of persons least likely to respect and give effect to the criminal laws. Are those statutes unconstitutional as depriving an accused of jurors <u>not</u> prone to convict? Obviously not. In harmony with that legislative point

of view, we can find no unconstitutional impartiality in the makeup of a death-qualified jury.

Our second reason for disagreeing with the Grigsby conclusion is a practical one: A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. It has always been the law in Arkansas, except when the punishment is mandatory, that the same jurors who have the responsibility for determining guilt or innocence must also should the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven. By analogy, in civil cases we do not affirm a finding of liability but remand for a determination of damages only, because the possibility of a compromise in the jury room links the two issues inseparably together. See Fulbright v. Phipps, 176 Ark. 356, 3 S.W.2d 49 (1928); Manzo v. Boulet, 220 Ark. 106, 246 S.W.2d 126 (1952). No similar problem seems even to have arisen in our criminal cases.

Every accused person being tried by jury is protected by a host of constitutional guaranties, particularly significant ones being the continuing presumption of innocence, the state's burden of proof beyond a reasonable doubt, the privilege against self-incrimination, and the unanimous verdict. Even with those guaranties, however, we should not be averse to suggested changes in the jury system (which we think should be specified by legislation, not by judicial directive) if the resulting advantages could be shown to outweigh the disadvantages. So far we have not seen a suggested change meeting that test.

The Grigsby proposed modification, involving the same case being tried twice before successive juries, is the least appealing of the possibilities that have come to our attention. Such a second trial would be comparable to having the actors in a

play, after the audience had let the theater, repeat their lines in a second performance for a few spectators in a nearly empty house. Such repetitive trials could not be consistently fair to the State and perhaps not even to the accused.

Other suggested modifications have included (a) the empaneling of a second jury at the outset, to listen to the actual trial, and (b) the selection of alternate jurors to replace, in the penalty stage of the trial, those jurors who could not vote for the death penalty in any circumstances. Colussi, The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt, etc., 15 Creighton L. Rev. 595 (1982). The difficulty with both those schemes for shuffling jurors in and out of the jury box is the separation of certain jurors' responsibility for the verdict from their responsibility for fixing the penalty. The two must go hand in hand, else the common law jury system no longer exists.

Finally, we perceive no answer to the practical objection posed by the Fifth Circuit Court in the Spinkellink case, supra. That is, what is to prevent a juror strongly opposed to capital punishment, in an effort to avoid feeling any responsibility for a death sentence, from choosing to hang the guilt-innocence jury by a vote for acquittal? If that stratagem became common knowledge, as it certainly would, the state's interest in the even-handed application of its laws, including the death penalty statute, could be frustrated. In fact, capital punishment could in effect be abolished, not by popular will but by a deliberate ruse.

Our conclusion is that death-qualification of the jury in capital cases has been and continues to be a constitutional procedure.

A second argument for reversal is that the trial judge should have found Rector incompetent to stand trial against the death penalty. A parallel question of competency was decided adversely to Rector on his earliest appeal from his conviction for the murder of Arthur Criswell. Rector v. State, 277 Ark. 17, 638 S.W.2d 672 (1982). The proof in the two cases is quite similar, although in this case a witness for the State, Dr. Hamed, thought that Rector's condition was much improved as compared to the time Dr. Hamed saw Rector soon after his surgery.

The expert proof is in sharp conflict, as it was on the other appeal. It is argued, however, that it takes a higher degree of competency to defend against the death penalty; so the two appeals are distinguishable. No doubt the issues may be more extensive in a death case, in which aggravating and mitigating circumstances are involved, but we do not discern any basis in the testimony for relating Rector's mental condition to the defense of a capital charge in particular. We must conclude, as we did on the earlier appeal, that the trial judge's decision is not clearly erroneous.

Third, it is insisted that the trial judge should have granted a sequestered voir dire examination of each prospective juror. A psychologist testified in generalities about the defects in an unsequestered voir dire, but he actually brought up nothing that a trial judge would not know from his own experience. The motion for sequestration was addressed to the trial court's discretion. Heffernan v. State, 278 Ark. 325, 645 S.W.2d 325 (1983). The only possibly prejudicial remark heard by other veniremen was too inconclusive to call for a mistrial--a fourth point argued for reversal. We find no abuse of the trial court's discretion in its rulings upon these matters.

A fifth point is that venireman McKenna was not so opposed to the death penalty as to warrant the court in excusing him for

cause. There are two answers to this contention. First, there was no objection to the excusal of McKenna. Perry v. State, 277 Ark. 356, 642 S.W.2d 865 (1982); Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980). Second, McKenna fundamentally took the position that he could not vote for the death penalty and perhaps not even for a life sentence without parole. He did say, however, in response to continued questioning by defense counsel: "I think - and this is really hypothetical - if I knew that the person accused would assuredly kill others in the future, then in that situation I guess I would reluctantly go along with it. Other than that, I would not." The Supreme Court has said, however, that a venireman should not be excused unless he is irrevocably committed to vote against the penalty of death "regardless of the facts and circumstances that might emerge in the course of the proceedings." (Our italics.) Davis v. Georgia, 429 U.S. 122 (1976), quoting a Witherspoon footnote. There was certainly no possibility that in the course of this trial McKenna would know that Rector would assuredly kill others in the future. Hence McKenna was properly excused for cause. If this is not so, then defense counsel is always in a position to present to a venireman a totally irrelevant hypothetical situation and, if the juror admits that he might vote for the death penalty in that case, insist that the juror is acceptable. We do not understand the Supreme Court's decisions to have gone that far.

Sixth, venireman Thacker, who was eventually excused by the defense, said that in some circumstances he thought the death penalty would be appropriate for the killing of a police officer, but he also said that his mind was not made up, there might be extenuating circumstances, and he would have to judge the case in the light of the total evidence. The appellant argues that the court should have sustained a challenge for cause, because Thacker's mind was set in favor of the death penalty, but we do

not so interpret the record. The challenge for cause was properly denied.

Seventh, the prosecutor did not inject remarks in the nature of argument in his opening statement to the jury, but the court at once gave a proper admonition to the jury. In view of the trial judge's unquestioned discretion in supervising the conduct of counsel, we find no abuse of that discretion in his denial of a mistrial.

Eighth, during the penalty phase of the trial the prosecutor requested that a personal note on an exhibit be removed before the jury saw the exhibit, but that request was denied. It is now argued that even the prosecutor's request called for a mistrial, because the ordinary rules of evidence do not apply to a defendant's presentation of mitigating proof. That statement is somewhat too broad, but in any event the incident was so decidedly trivial as not to require a mistrial.

Finally, it is argued that upon comparing this case with other capital cases we should reduce the penalty to a life sentence without parole. When we consider that in a period of two days Rector killed one man, for which was convicted of murder, committed aggravated assaults upon two others, and then deliberately shot a police officer who had done nothing to provoke an attack, we find nothing arbitrary in this death sentence as compared to our other cases.

Counsel insist, however, that because Rector's self-inflicted brain injury had substantially the same effect as a frontal lobotomy, causing him to be mildly retarded mentally and to be somewhat unemotional, the State of Arkansas should not permit the execution of a person in that condition. This case differs, however, from Giles v. State, 261 Ark. 413, 549 S.W.2d 479 (1977), cert. denied 434 U.S. 894, in that there the jury

arbitrarily disregarded an impaired mental condition that existed when the crime was committed, which led us to reduce the sentence. Here Rector had no such mental impairment until he attempted suicide after the crime - facts that were before the jury. In our opinion such circumstances arising after the crime affect the matter of clemency and should properly be addressed to the Governor, who has the facilities for investigating all the facts. Although we may reduce a death sentence to life without parole, and have done so in the past, that action is taken as a matter of law, not as an act of clemency.

We find no prejudicial error in the contentions that are made for reversal or in any other matters that have been brought to our attention under Rule 11 (f).

Affirmed.

CONCURRENCE

JOHN I. PURTLE, Associate Justice

I concur in the results of the opinion of this court but wish to comment on a portion of the opinion dealing with death qualified juries. The majority correctly states that persons who are unalterably opposed to imposition of the death penalty should be excluded and I agree. I think Witherspoon is in accord with this view. The mistake made in some trial courts is in excluding persons who have moral or religious scruples against the death penalty but who would agree to impose it if the law and the circumstances warrant it in the case being tried. Witherspoon never intended to exclude this type juror. Neither did it indicate that only those who favored the death penalty should comprise trial juries. I think the correct procedure on this controversial issue lies somewhere between excluding prospective jurors who have scruples against the death sentence and including

only those who have no scruples against imposing such a penalty. There is a readily apparent difference in the probable verdict of a jury composed of 12 people have scruples against the death penalty and 12 others who unquestionably favor it. It takes a mixing from both categories to form a jury which is representative of the community. Only those unalterably opposed to the death penalty and those who actively support it should be excluded from serving when death is the possible penalty.

I have never thought that all or even most people who favor the death penalty are barbarians in modern society. However, I do feel that a jury composed of only such persons is not representative of any community. Neither would a jury composed only of those having scruples against the death penalty represent the community. The selection of jurors should not favor the accused nor should it favor the state. A properly selected jury enters upon its duties slanted toward neither side. Thus selected, it would not be proper to refer to the jury as a death qualified one. This controversy would disappear if the sentencing process utilized a different jury from the one which decided the question of guilt. This could be accomplished by either having a second jury or allowing the trial court to impose sentence. A second jury would be asked to consider aggravating and mitigating circumstances and vote on sentencing the person found guilty. In either event the law and our procedure would have to be amended to provide for such a process. Appellant's trial was conducted in accordance with present law and procedure.

The majority states the most cowardly and contemptible criminals are the ones who seek to prevent a death qualified jury. I am of the opinion that an accused is not considered to be a criminal, at least in the case being tried, until after he has been convicted. The right to an impartial jury as guaranteed by the Sixth Amendment to the United States Constitution is not,

in my opinion, a favored position not enjoyed by others. Everyone is entitled to the protection of our Constitution.

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DEPUTY

November 21, 1983

Dan Stripling
Attorney at Law
P. O. Box 388
Clinton, AR 72031

Re: CR83-39 Ricky Ray Rector
v. State of Arkansas

Dear Mr. Stripling:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied."

Sincerely yours,

Dona L. Williams

Dona L. Williams, Clerk

DLW:rh

cc: M. Watson Villines, II
Alice Ann Burns
Lucy Glover
Michael Gaines
Willis Sargent
A. L. Lockhart

ORIGINAL

83-6080

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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

No. _____

RICKY RAY RECTOR.....Petitioner

vs.

STATE OF ARKANSAS.....Respondent

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The petitioner, Ricky Ray Rector, who is now held on death row in the Tucker Unit of the Arkansas Department of Corrections, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of the United States without payment of costs and to proceeds "in forma pauperis" pursuant to Rule 46 of the Rules of the Supreme Court.

The petitioner's affidavit in support of this motion is attached hereto.

Clarence Daniel Stripling
CLARENCE DANIEL STRIPLING
Counsel for Petitioner
STRIPLING & MORGAN
P. O. Box 388
Clinton, Arkansas 72031

CERTIFICATE OF SERVICE

I, CLARENCE DANIEL STRIPLING, counsel for petitioner herein, do hereby certify that a sufficient number of true and correct copies of the foregoing motion and affidavit have been served on opposing counsel this 6th day of January, 1984, by mailing said copies, first class postage prepaid, to the Honorable J. Steven Clark, Office of the Attorney General, Justice Building, Little Rock, Arkansas 72201.

Clarence Daniel Stripling
CLARENCE DANIEL STRIPLING

RECEIVED
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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1983

No. _____

RICKY RAY RECTOR.....Petitioner

vs.

STATE OF ARKANSAS.....Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS

I, RICKY RAY RECTOR, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled case; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are the following:

Imposition of the death sentence in my case violated the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

Yes___ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

AMERICAN Transportation $6,386.00 (per year)
(Wards)

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Yes____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

_____

3. Do you own any cash or checking or savings account?

Yes_____ No X

a. If the answer is yes, state the total value of the items owned.

_____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable proeprty (excluding ordinary household furnishings and clothing)?

Yes_____ No X

a. If the answer is yes, describe the property and state its approximate value.

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any

questions in this affidavit will subject me to penalties for perjury.

Ricky Ray Rector
RICKY RAY RECTOR

STATE OF ARKANSAS
COUNTY OF VAN BUREN

Subscribed and sworn to before me this 11th day of January, 1984.

Don Stripling
Notary Public

(SEAL)

My commission expries: 3/15/84

Supreme Court, U.S.
FILED
MAR 12 198

83-6080

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

RICKY RAY RECTOR — PETITIONER

VS.

STATE OF ARKANSAS — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT

JOHN STEVEN CLARK
Attorney General

By: ALICE ANN BURNS
Deputy Attorney General

By: VICTRA L. FEWELL
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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER THE ARKANSAS SUPREME COURT ENGAGED IN COMPARATIVE REVIEW AND IF NOT, WHETHER THE REFUSAL TO DO SO, TAKING INTO ACCOUNT PETITIONER'S PRESENT MENTAL CONDITION, RESULTED IN A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS PER FURMAN V. GEORGIA?

II.

WHETHER PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A JURY COMPOSED BY A CROSS-SECTION OF THE COMMUNITY AND PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A TRIAL BY A JURY WHICH IS NOT "GUILT PRONE" WERE VIOLATED BY THE STATE'S ACT OF DEATH-QUALIFYING THE JURY WHICH DETERMINED PETITIONER'S GUILT OR INNOCENCE?

III.

WHETHER REQUIRING PETITIONER TO STAND TRIAL IN A CAPITAL CASE, GIVEN HIS MENTAL CONDITION, WAS A VIOLATION OF THE FOURTEENTH AMENDMENT?

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United States ex rel. Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977) 4

United States v. Morrison, 449 U.S. 361, 364 (1981) 5

United States ex rel. Townsend v. Twomey, 452 F.2d 350, 362-63 (7th Cir.) cert.denied, 409 U.S. 854 (1972) 4

United States v. Wood, 299 U.S. 133 (1936) 5

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STATUTES AND OTHER AUTHORITIES

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Death Qualification and the Fireside Induction 5 UALR LJ 1 (1982) 2

Ark. Stat. Ann. § 41-1501(1)(b)(Repl. 1977) vi

OPINION BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction for capital murder and death sentence is reported at 280 Ark. 385, 659 S.W.2d 168 (1983).

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and statutes are found in petitioner's brief at pages 2-3.

PRELIMINARY STATEMENT

In responding to the issues raised in the petition, respondent has joined with petitioner in urging this Court grant certiorari on the issue regarding death qualification of the jury as raised in Point II. As to the other two issues raised, Points I and III, respondent's position is that review by this Court is not warranted.

STATEMENT OF THE CASE

On March 25, 1981 petitioner was charged with capital murder, said offense alleged to have been committed in violation of Ark. Stat. Ann. § 41-1501(1)(b)(Repl. 1977). The charges stemmed from the shooting death of a Conway, Arkansas, police officer March 24, 1981.

Petitioner was tried to a jury November 8-10, 1982, found guilty as charged and sentenced to the death penalty. Petitioner's conviction was affirmed on appeal by the Arkansas Supreme Court. Rector v. State, 280 Ark. 385, 659 S.W. 168 (1983). In the opinion of the Arkansas Supreme Court, it was determined that the trial court properly found that petitioner was competent to stand trial. 280 Ark. at 397. Pet.A. 11.

In petitioner's statement of the case, it is stated that a "debridgement" was performed on him, the effect of which was that of a pre-frontal lobotomy. Petition at pp. 3-4. The appellate record reflects, however, that the testimony on that issue was in conflict. Respondent's appendix, pp. 3-9.

Respondent otherwise concurs in petitioner's statement of the case.

I.

THE ARKANSAS SUPREME COURT UTILIZED PROPER PROCEDURES IN COMPARING PETITIONER'S DEATH SENTENCE.

Petitioner contends that the Arkansas Supreme Court did not engage in proper comparative review of the death sentence imposed in this case. In the opinion of the court below, however, it was specifically determined that, on the facts of this case, the death penalty was not arbitrarily imposed compared to other cases. 280 Ark. at 399. Pet. A. 13-14. Thus, the Arkansas Supreme Court did not depart from its announced practice of comparative review. Collins v. State, 261 Ark. 195, 548 S.W.2d 106 (1977); Henry v. State, 278 Ark. 478, 647 S.W.2d 419 (1983), Hickman, J., concurring.

Moreover, this Court recently held that the Eighth Amendment does not require state appellate courts to engage in comparison review before a death sentence could be affirmed. Pulley v. Harris, ____U.S.____, 104 S.Ct. 871, ___L.Ed.2d _____(Jan. 23, 1984).

The decision in the instant case is not a departure from caselaw precedent established by the Arkansas Supreme Court or the United States Supreme Court. The pending petition should be denied.

II.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY WERE NOT VIOLATED BY "DEATH-QUALIFICATION" OF THE JURY, AND THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THIS ISSUE AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Petitioner's jury was selected pursuant to the guidelines promulgated by this Court in Witherspoon v. Illinois, 391 U.S.510 (1968). There is no allegation of Witherspoon error. Petitioner presented evidence purporting to show that this selection procedure, commonly known as "death-qualification" deprives a capital murder defendant of an impartial jury, as well as of a jury that is a representative cross-section of the community. This evidence was in the form of a law review article, "Death-Qualification and the Fireside Induction," 5 UALR L.J. 1 (1982). The article summarized a number of psychological studies done over a period of some 25 years.

As petitioner notes, the Arkansas Supreme Court opinion upholding his conviction and sentence, Rector v. State, 280 Ark. 385, 659 S.W.2d 168 (1983) (hereinafter cited to petitioner's appendix), repudiates Grigsby v. Mabry, 569 F.Supp. 1273 (E.D. Ark. 1983), in which the District Court held that "death-qualification" violates a capital defendant's right to trial by an impartial jury.

Respondent joins petitioner in requesting that this Court grant certiorari to decide this issue as a matter of federal constitutional law. Respondent takes this position because the "death-qualified" jury issue meets the statutory criteria for review on certiorari, as well as the criteria expressed in the rules of this Court. 28 U.S.C. §1257(3) (1977); S.Ct.R. 17.

1. A clear conflict exists between the opinions of the Arkansas Supreme Court, the federal District Court for the Eastern District of Arkansas, and the Eighth Circuit Court of Appeals. The Grigsby litigation originated in federal

district court when the petition for writ of habeas corpus was filed in 1978.

The Grigsby issues have thus been in litigation for several years. See Point II, 5, infra. Upon its initial review of the case, the Eighth Circuit Court of Appeals remanded for an evidentiary hearing. Grigsby v. Mabry, 637 F.2d 525, 527 (8th Cir. 1981) The Court of Appeals enunciated three (3) factual issues to be resolved:

> (1) whether death-qualified jurors are more likely to convict than jurors selected with regard for their views on the death penalty;
>
> (2) whether death-qualified jurors are more likely to convict of a higher degree of murder than jurors selected without regard for their death penalty views; and
>
> (3) whether the jurors in this case were in fact death-qualified. The court held that "if (these questions) are answered in the affirmative, Grigsby has made a case that his constitutional rights have been violated and he would be entitled to a new trial."

In rejecting the Eighth Circuit's interpretation of Witherspoon, the Arkansas Supreme Court assumed arguendo that the answers to Questions (1) and (3) were in the affirmative. Pet. A-3, 6. It ultimately concluded as a matter of law that "death-qualification," or jury selection pursuant to Witherspoon "is a constitutional procedure." Pet. A-10.

2. The District Court's holding in Grigsby [in response to the Eighth Circuit's remand], is in clear conflict with the holdings of other circuit courts of appeal. McCorquodale v. Balkcom, 721 F.2d 1493, 1502 (11th Cir. 1983); Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. 1981); Spinkellink v. Wainwright, 578 F.2d 582, 596-98 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979);

United States ex rel. Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), cert. denied, 429 U.S. 1064 (1977); United States ex rel. Townsend v. Twomey, 452 F.2d 350, 362-63 (7th Cir.), cert. denied, 409 U.S. 854 (1972); Sinclair v. Turner, 447 F.2d 1158, 1166-67 (10th Cir. 1971); Tuberville v. United States, 303 F.2d 411, 418-21 (D.C. Cir. 1962).

3. The Arkansas Supreme Court has decided an important question of federal law which has not been, but should be, settled by this Court. The difficulties engendered by 15 years of uncertainty on this question were succintly recognized by the District Court in its order issued subsequent to the main opinion in Grigsby. Grigsby v. Mabry, Memorandum and Order, (E.D. Ark. Aug. 18, 1983), slip op. at 2 (emphasis in the original):

> The serious and difficult problem arises because of the potential consequences of the Court's ruling. The United States Supreme Court itself may have considered the potential wrenching consequences when it failed to adopt a per se rule in Witherspoon v. Illinois, 391 U.S. 510, back in 1968. By its ruling in that case it invited further study. Although the results of such studies are in, and are overwhelming in the direction of their thrust and in their consistency, this Court now believes they were unnecessary. The Supreme Court should, it is respectfully suggested, have relied upon traditional legal analysis, rather than social science and empirical evidence, in adopting a per se rule back in 1968 consistent with established constitutional principles. There is no good or convenient time to correct a broadly-followed unconstitutional practice. Fifteen years after Witherspoon, however, the issues can no longer be avoided despite the turmoil which may result from the delay in coming to grips with those issues.

(This opinion is provided in respondent's Appendix.)

4. Another, and one of the most significant, reasons this Court should grant certiorari is that the Arkansas Supreme Court's holding is in line with this Court's holdings on numerous subissues. In contrast, however, the District Court in Grigsby, in order to reach its conclusions, ignored or, it is respectfully submitted, incorrectly distinguished many well-established principles of federal constitutional law enunciated by this Court:

Rushen v. Spain, 78 L.Ed.2d 267, 273 (Dec. 12, 1983); Smith v. Phillips, 455 U.S. 209 (1982); Rosales-Lopez v. United States, 451 U.S. 182, 189 (1981); United States v. Morrison, 449 U.S. 361, 364 (1981); Adams v. Texas, 448 U.S. 38 (1980); Duren v. Missouri, 439 U.S. 347, 363-64 (1979); Lockett v. Ohio, 438 U.S. 586, 597-97 (1978); Patterson v. New York, 432 U.S. 197 (1977); Taylor v. Louisiana, 419 U.S. 522, 538 (1975); Apodaca v. Oregon, 406 U.S. 404, 413 (1972); Bumper v. North Carolina, 391 U.S. 543 (1968); Witherspoon v. Illinois, 391 U.S. 510 (1968); Swain v. Alabama, 380 U.S. 202, 212, 220, 222 (1965); Irvin v. Dowd, 366 U.S. 717, 722 (1961); Dennis v. United States, 339 U.S. 162 (1949); Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946); United States v. Wood, 299 U.S. 133 (1936).

5. The District Court's opinion is currently on appeal to the Eighth Circuit Court of Appeals. That fact, should not, however, deter this Court from granting certiorari on this issue, in light of the several years this litigation has been pending in the federal system. As indicated earlier, the Grigsby litigation originated in federal district court as a petition for writ of habeas corpuse filed in 1978. The District Court held an evidentiary hearing in 1979, decided the case on a continuance issue and ordered the State to hold an evidentiary hearing or the writ would issue. On appeal, the Eighth Circuit held that the District Court should have decided the issues raised in the petition and remanded for another evidentiary hearing in that forum. A second evidentiary hearing was held on July 13-17 and July 29-31, 1981. Grigsby, 569 F.Supp. at 1277. The District Court did not hand down its opinion until more than two (2) years later, on August 5, 1983.

Besides the obvious delay, the procedural history of this case is a "paradigm of perturbation." Should the Eighth Circuit again remand the case for further findings by the District Court, the uncertainty generated by the

conflict between state and federal caselaw on the issue will continue unabated, with no clear prospect for concrete resolution in the near future. Respondent is aware that either the State or Grigsby could seek review by this Court after the Eighth Circuit renders its decision. The Grigsby issues, however, have been considered and reconsidered within the federal system alone for a period of six years. Respondent strongly urges that, a clean consideration of these issues, as a matter of law, can be had by this Court by granting review in the instant case. Expediency of resolution thus tilts the balance in favor of this Court's exercise of its authority to grant discretionary review.

6. As petitioner notes, Arkansas prosecutors have only two realistic options as they attempt to meet their prosecutorial responsibilities in capital cases: If they follow State law, they risk having their most expensive and complicated litigation being nullified in the District Court; if they follow Grigsby, they are in clear violation of State statutory law and the precepts of the Arkansas Supreme Court. Thus, neither option rests on settled law and potentially may lead to anamolous results.

Respondent notes in this regard that Grigsby has recently been followed in Keeten v. Garrison, No. C-C-77-193M (W.D.N.C. Jan. 12, 1984), causing North Carolina prosecutors to face the same dilemma as posed in Arkansas.

Thus, the impact of the Grigsby decision has been felt across the country. In many states where the issue was considered judicially resolved, State capital defendants and federal habeas petitioners have been encouraged to seek evidentiary hearings and relitigate factual issues previously determined. The potential for wasting judicial resources becomes readily apparent with the relitigation of these same factual issues.

In addition, the death qualified jury issue has produced

subissues of procedural waiver presented in each capital case. How and when the issue is raised in the State courts has properly been held to be determinative of the defendant's right to raise it in federal court. See, e.g., Pickens v. Lockhart, 714 F.2d 1455, 1458 n. 2 (8th Cir. 1983); Woodard v. Sargent, 567 F.Supp. 1548, 1568-73 (E.D. Ark. 1983); Collins v. Lockhart, 545 F.Supp. 83, 89-90 (E.D. Ark. 1982); Hulsey v. Sargent, 550 F.Supp. 179 (1981). As Woodard and Hulsey illustrate, these findings require laborious analyses of various subissues. Even where the federal courts ultimately find the issue barred, the State must litigate the precise facts of procedural waiver in every case in which a "death-qualified" jury was seated. (This includes cases in which the defendants received life without parole or were convicted of a lesser included offense.)

In addition, this Court has recently denied requests for or vacated stays of execution in other capital cases, indicating that it finds no merit in the Grigsby issues. In Maggio v. Williams, 104 S.Ct. 311, 78 L.Ed. 43, 47 (Nov. 7, (1983), the Court upheld the finding that Williams was not entitled to a hearing on the representative cross-section issue.

Similarly, in Sullivan v. Wainwright, 104 S.Ct. 450, 78 L.Ed. 2d 210, 212 (Nov. 29, 1983,), the Court listed as one of the five issues presented "(iii) that the jury that convicted him was biased in favor of the prosecution." The Court held that "(t)he first three of these claims have been presented several times previously in both state and federal courts and have been found to be meritless." Respondent notes that the death sentences imposed in these two cases were recently carried out.

In Woodard v. Hutchins, 34 Crim.L.Rptr. 4156 (Jan. 11, 1984), the Court vacated a stay of execution and found an abuse of the writ for filing a successive habeas petition which alleged, inter alia, "that the jury selection process

was unconstitutional." Id. at 4156. A concurring opinion made it clear that the issue presented was the guilt-proneness of a jury empaneled pursuant to Witherspoon, Id. at 4157 (Rehnquist & O'Connor, J.J., concurring).

These developments may suggest this Court's recognition that state criminal convictions, even in capital cases, are worthy of finality as based on constitutionally valid statutory procedures, and that interminable review does not enhance the credibility of our criminal justice system. Respondent thus urges this Court to foreclose criminal defendants' invocation of the "Witherspoon invitation" (Grigsby, 569 F.Supp. at 1290] which has stood open in various fashion since 1968. In so urging, respondent again calls this Court's attention to the district court' recognition that the death qualified jury issue can be resolved as a matter of law. If it is determined, however, that a review of factual issues as deduced from evidence, is necessary, respondent suggests that this Court may consider bringing up the record in Grigsby for that purpose. To the best of respondent's knowledge, the Grigsby hearing in federal district court may be the most exhaustive presentation of evidence, including the latest available studies.

The Arkansas Supreme Court and the federal district court in Arkansas have rendered decisions in sharp conflict on the issue of death qualified juries and their role in capital litigation. A federal district court in North Carolina has recently followed the decision rendered in Grigsby. The Rector decision, however, still appears to be the rationale followed by a majority of jurisdictions. The state of flux and uncertainty generated in the State of Arkansas alone on this issue, however, has prompted respondent to take the unusual posture of agreeing with petitioner that certiorari should be granted in this case. With the utmost respect to this Court, respondent believes the issue as presented herein is ripe for review and timely warranted.

III.

PETITIONER WAS PROPERLY DETERMINED COMPETENT TO STAND TRIAL.

Petitioner suggests under this issue that he was not mentally competent to stand trial. He further alleges that the procedure utilized below, while fair on its face, worked an injustice as to him in reaching the conclusion that he was mentally competent.

As indicated in petitioner's statement of the case, extensive hearings were held on petitionr's mental competency, both as to the instant proceeding and regarding petitioner's previous trial for murder. See, Petition, p. 4. The court below, after reviewing all the evidence, determined the trial court's ruling on this issue was not clearly erroneous. 280 Ark. at 397. Pet. A. 11. When State court findings find "fair support" in the record, the federal courts are bound by the State court's findings of historical fact. Wainwright v. Goode, 78 L.Ed.2d 187, 192-93 (Nov. 28, 1983); Maggio v. Fulford, 103 S.Ct. 2261, 76 L.Ed.2d 794, 799-800 (June 6, 1983); Marshall v. Lonberger, 103 S.Ct. 843, 74 L.Ed. 2d 646, 658-60 (Feb. 22, 1983); Sumner v. Mata, 449 U.S. 539 (1981). This is especially true when those findings relate to the credibility of the witnesses. Goode, 76 L.Ed.2d at 800; Lonberger, 74 L.Ed.2d at 658-60.

This is not a case in which an insane defendant is to be executed. See, Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), cert. denied, 104 S.Ct. 211. Petitioner does not contend that proper procedures were not followed or that prior caselaw was disregarded. Thus, review should not be granted on this issue.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. For this reason, respondent has joined with petitioner in urging that this Court grant review on writ of certiorari as to the grounds raised in Point II of the petition. Respondent respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal with regard to the issues raised in Points I and III. Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief, respondent respectfully prays that this Court deny review on writ of certiorari in Points I and III, but grant review on Point II.

Respectfully submitted,

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By: Alice Ann Burns

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CERTIFICATE OF SERVICE

I, Alice Ann Burns, Deputy Attorney General, do hereby certify that a copy of the above and foregoing pleading has been served on petitioner by placing a copy of same in the United States Mail, postage prepaid, addressed to Mr. Clarence Daniel Stripling, P. O. Box 388, Clinton, Arkansas 72031, attorney of record for petitioner, this 9th day of March, 1984.

Alice Ann Burns
ALICE ANN BURNS

APPENDIX FOR RESPONDENT

Testimony of Sayed K. Hamed	A1-53
Judgment, Grigsby v. Mabry, PB-C-78-32	A -54
Memorandum Opinion and Order, Grigsby v. Mabry, PB-C-78-32	A-55-59

A1

Thereupon,

SAYED K. HAMED

having been called for examination by counsel for the State, and having been first duly sworn on oath, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CLAWSON:

Q Would you state your name for the record, please, sir?

A Yes, sir. Sayed, S-a-y-e-d, K. Hamed, H-a-m-e-d.

Q And how are you employed, sir? Where do you work?

A At Arkansas State Hospital.

Q All right. How long have you been there?

A Since February of 1981.

Q Would you give us, briefly, an idea of your educational training and background beginning with college?

A Yes, sir. I graduated from the University of Nebraska at Omaha, Nebraska; I took an internship in Memorial Hospital, Long Beach, California; I have three years training in internal medicine at Long Beach Veterans Administration Hospital; I have, also, three years, uh, psychiatry training at the Wayne County Hospital, Michigan; I have one year training in forensic psychiatry at the Institute of Psychiatry in Law, , all at the University of Southern California in Los Angeles. I am certified by the American Board of Psychiatry as of April, 1980.

Q All right, sir, thank you. Now, did you have occasion in your capacity there at the state hospital to evaluate Ricky Rector?

A Yes, I did.

Q And do you recall when that evaluation began?

A On May 1, 1980 through May 28, 1980 -- '81, I'm sorry.

Q All right. And did you have available to you during the course of that evaluation the reports and tests that have been testified here to from Dr. Drummond and Dr. Mallory?

A Yes.

Q Did you have other information available to you?

A Yes, I do -- I did.

Q And did you personally talk with Mr. Rector during the course of this evaluation?

A Yes, I did.

Q Do you remember how many times?

A Yes. Officially on a structured nature I talked to Mr. Rector on 5/1/1981 on his date of admission; that was for half an hour to assess the nature of the problem, the direction, for planning his evaluation.

The second structured, uh, interview was on 5/20/1981 for an hour and ten minutes. The third structured interview was on 5/21/1981 for two and a half hours.

Q All right, sir. Now, based on the information you

had available, the testing, the reports you had and your personal observations, what was your evaluation of Mr. Rector's condition at that time? And, if you would, just describe for the Court how you arrived at that, what your processes were.

A Yes. Can I have the chart, please?

On my original assessment of Mr. Rector on the 1st of May, there was obvious to me that what we're dealing with is an overlap between psychiatry and neurology. He came to us from -- following a debridement for, uh, gunshot wound involving the head and a craniotomy which was done for this. And I decided that my -- that our evaluation should include as much evaluation of the organic as well as functional aspects.

Q This injury he had, was that a lobotomy?

A The injury?

Q The surgery and --

A No. It is, uh, the debridement of a head wound injury. There is no lobotomy; debridement of gunshot wound to the head, that is the operation.

Q What is the difference between that and a lobotomy?

A Oh, lobotomy is a much, much more extensive operation where you go into the tracts that go to the frontal lobe. These tracts are coming from the area called the thalamus which is the mid-brain by definition, the middle of the brain. These are branching, hugh ramifying tracts that you interrupt these projections from the thalamus to the, uh, frontal lobe.

Q And that was not done in this case?

A There is no indication here that that was done, and the area that was removed, uh, was described as three and a half to four centimeters.

Q How big is that?

A That would be about this big.

Q Inch, inch and a half, maybe?

A Two inches.

Q Two inches, okay. Go ahead, doctor.

A Okay. I, as I explained, my original assessment of him, I assumed that he has organic lesion unless it is proven otherwise. And we went about -- I went about to evaluate it by the different possible speciality, each one within his area. I felt he should be seen by a neurologist; I arranged the necessary studies, and I arranged for him to be seen by the neurologist of the Arkansas State Hospital, and that is Dr. Robert Watson.

Uh, and following the receipt of the neurologist's report, uh, we -- I thought that to give a complete evaluation -- the neurologist's report indicated that there was no major involvement of motor functions. There has been -- the patient has been on Dilantin, and the neurologist did not think that Dilantin is even needed because of the nature of the involvement.

I have, also, reviewed -- obtained and reviewed the chart of his hospitalization at University Hospital. I communicated with Dr. Arthur personally, the neurosurgeon who

had performed the surgery.

And following the neurology report, I wanted to evaluate, to assess, because the injury was on the left side, for any possibility of the speech area being involved. And the significance of this evaluation is to assess brain functions in the sense of comprehension of speech as well as expression of speech. This is what aphasia problem relates to, the ability of the individual to comprehend, the ability of the individual to express himself. Dr. Drummond evaluated his visual and his auditory ability, his ability to listen to an instruction and comprehend it and his ability to see, uh, work or reading and comprehend it, and his ability to express himself.

On anatomical bases there was not highly needed, as per my discussion with Dr. Arthur, he did not feel there is any aphasia problem involved in -- in the process.

MR. MILLER: I object, your Honor. He can't testify to the hearsay of what Dr. Arthur told him.

MR. BRAZIL: They've done it all day long.

MR. MILLER: We stipulate simply that --

MR. BRAZIL: He's got his report and charts right there with him.

MR. MILLER: He can read Dr. Arthur's report, if he'd like. We have no problems with that, but to testify to a conversation --

THE COURT: My information is that Dr. Arthur's

report is an instrument from which he normally and naturally makes up his mind in arriving at decisions of an expert nature and, therefore, he can testify from them.

MR. MILLER: We have no objection to him testifying to Dr. Arthur's report. We do have an objection to him testifying to a conversation he allegedly had with Dr. Arthur that we know nothing about.

THE COURT: If that's the case, then I would sustain the objection.

MR. MILLER: Thank you, your Honor. We ask that all discussion of his oral report of his discussions with Dr. Arthur be stricken from the record.

Q What does Dr. Arthur's report show you about the offense? I believe we were discussing that before we were interrupted.

A Uh, the records of the hospitalization describe the -- the debridement, which is cleaning of the wounds, cleaning of the areas that has been involved by the, uh, the bullet, and describes suturing the dura -- the dura, which is the outer lining of the brain. Uh, it describes that he had -- uh, the patient has sustained one complication in the form of developing pneumonia from which he has recovered. He did not develop any complication involving the brain.

Q All right, sir. Let me ask you, doctor, it has been determined, has it not, that certain portions of the brain

control certain functions of the body?

A Yes, sir.

Q From the report can you tell if the debridement that was undertaken in Mr. Rector's case, affected the part of his mind that ceal with motor skills, speech, dexterity, that sort of thing?

A Motor skills and dexterity has been determined by the neurologist and has been -- the only residual is a very minimal weakness of the thigh movements on the right side. On the upper extremity there has not been any gross disturbance in the motor functions.

Q Is this what was described earlier as a frontal lobotomy syndrome?

A Yes, sir.

Q Is that present in Mr. Rector?

A No. As the lobotomy syndrome, I -- the lobotomy syndrome is quite an extensive procedure with a lot of changes. There's no references in the charts or in the operative reports of a lobotomy syndrome or a lobotomy undertaken. If the tracts, these huge tracts, had been exposed, this would have been described in the operative reports. And if they were exposed, nobody is going to cut them these days. What is done today is cingulumotomy. Nobody does lobotomy, especially University Hospital.

Q What is cingulumotomy?

Q Cingulumotomy is a substitute, is the one that offers tranquility like his Honor was referring to. Uh, the cingula gyrus is in the inner side of the brain, when the two sides meet on the lower part of the big, uh, dividing portion, below it -- below what we call the corpus callosum is the -- above it is one gyrus called the cingula gyrus. This is the one that is primarily involved in emotion. This is the one that is part of the limbic system that was referred to. The limbic system is the inside, primarily; it is a circle -- circuit, reverberating circuit in the middle as we look at it longitudinally and its primary involvement is with the cingula gyrus. You cut certain parts of this if you are dealing with a person that has poor social controls or you need to -- if we are desperate in controlling their behavior, so to speak.

Q Can you tell from the report whether this part of Mr. Rector's brain was affected?

A Was not even touched.

Q Not touched?

A No. There was no need for it.

Q And, I believe, earlier it was referred to that the frontal lobe syndrome and the frontal lobotomy syndrome are the same thing. Is that --

A No. Frontal lobe syndrome is a variety of picture -- variety of the clinical picture. Lobotomy syndrome is a clinical picture secondary to cutting of these tracts, which is

a lobotomy act. And people with lobotomy usually -- the minimum complication is frequent convulsions, and that's why -- one of the reasons, besides the unexpected behavior, they lack all responsibility; they become very reckless -- the frontal lobe syndromes are groups of syndromes, not only one. You differentiate between the convexity syndrome and the orbital syndrome.

The convexity is a part of the frontal lobe which is -- goes with this direction here. The orbital is the one that lies on the base of the skull. They are two different syndromes; they give us two different clinical pictures. The convexity gives you a person who says, I don't care; I don't know what comes; I don't know what goes. They give a total false picture of depression; they don't care. People think they are depressed.

The orbital is not. Orbital is a person who gives you a clinical picture of a person who has lost the social manners, so to speak. They become hyperaggressive; they become sexually inappropriate.

Now, both of them are cut -- you get what you refer to as irritable euphoria. And these syndromes vary from the cause of it. You take a person with Pick's disease, which is a degenerative disease, he'll give you a different clinical picture than an individual with a tumor affecting the frontal lobe. It is not an identical picture; it never is.

Q Doctor, in and as a part of your evaluation, did you have -- was part of that to test or check the memory capacity or

memory ability of Ricky Rector?

A Oh, mental -- you mean myself?

Q Yes, sir.

A Yes, sir.

Q How did you --

A Well, my evaluation has consisted of three structured interviews. However, we make them -- excuse me, we make very good use of the fact that the patient is there for thirty days. The patient has arrived there; I frequently go down to talk to the attendants, especially in the afternoon, how is this fellow doing; how is this fellow doing; what do you observe of that fellow; what do you observe of this fellow. Okay? So, I get the observations of the personnel working with him. This is a continuous feedback, observing him more or less, maybe talk to him every once in a while.

The interviews are time devoted solely only for talking to Rector, but in between there is some form of direct or indirect interactions.

Q Okay. Now, in the occasions when you interviewed him one to one --

A Yes.

Q Okay. -- you said that the memory was evaluated to some extent?

A Yeah. What I needed was to evaluate him like Mr. Miller has said is we needed to have -- did he have rational,

factual understanding of his problem. This is the primary issue. And, uh, we have attempted to communicate with the family; the family refused to respond, refused to come down. Uh, we have frequent attempts because this is the function of the social worker.

Uh, I have seen him at three different -- the reason for seeing him at three different settings, his coming now may be a little bit apprehensive, maybe the situation is he has not adapted to the institution, has not adapted to me, so you see him a little bit later and you see him a little bit later. And there are things that cannot demonstrate itself in one interview that does not demonstrate itself in others.

During the first interview, my -- the object of it is to assess the general total picture and the needs. And that's how I plan the various studies and the various concentrations needed. The second, as we interacted with him, as we got some of the results back, I had an interview with him on 5/20 and another interview on 5/21. This is a forensic psychiatric evaluation for the purpose of determining his competency because I recall one thing unique about this request they requested -- the request was primarily on -- the emphasis was primarily on the competency.

Q Now, what do you do in these interviews that enable you to arrive at your decision? Explain the process.

A You evaluate the individual as to his behavior, his

capabilities, and his limitations.

Q How do you do that?

A By interacting with him, and the interaction is mostly verbal plus observations.

Q As you mentioned a moment ago, a part of this is to test his memory?

A Part of it is, but --

Q How is that done? Exactly what do you do?

A Directly and indirectly. One of the direct methods is to see -- when you talk about memory, what are you talking about? You are talking about three phenomena; you are talking about registration; you are talking about retention; you are talking about recall.

His ability to register, registration, is when you hear what I say reaches you. You become aware of it. Retention is it makes a mark in the cells of the nervous system. Recall is your ability to retrieve this information. Now the ability to retrieve as very well -- we'll talk about short term and we talk about long term.

Q Okay.

A So, you evaluate the individual for those three aspects of the memory; you evaluate him for the long term; you evaluate him for the short term; you evaluate whether he can register. Uh, Rector thinks, for example -- I used very simple things and -- the cow is brown and white. He repeats it for me;

he was able to register. After a certain duration of time, you tell him, okay, you name a few objects and you change the subject and you talk of something else and you come back and ask him about those objects. Had he been able to register and retain the objects? His ability to recall certain numbers forward and backward, the number of digits he can recall forward and backward, repeat them after you. His ability to carry on with his conversation in a connected manner is part of his memory. When you are talking to him about his family, about his wife, about his child and he doesn't divert and talks about, oh, I want to go to dinner or I want to do this, his attention, his concentration. These are the associated -- testing of the associated areas as they affect the memory, one of the most complicated functions.

Q These capabilities were present to your satisfaction?

A Were present except -- yes, except when, as I indicated in my report, they were present when tested by neutral subjects, subjects that do not represent or come close to the issues related to the charges.

Q Doctor, let me back up and ask you something.

A Sure.

Q I asked you while ago if it has been determined that certain areas of the brain control certain functions of the body. Would that also be true of memory?

A Yes.

Q Are there certain areas of the brain --

A Yes, sir.

Q Can you tell from that report, were the areas of the brain which affect and control memory affected by the surgery or the gunshot?

A Uh, you can tell -- you -- you're dealing -- maybe I have to rephrase the question a little bit. You want to know the affect of the injury -- the possible affect of the injury on his memory?

Q Exactly.

A All right.

Q An anatomical problem.

A Well, there is anatomical and there is clinical.

Q Okay.

A Okay. We take what I might call clinical. The affect of the injury as a head injury per se, head injury, bang, to the head. This will cause defects in memory and is characterized by two features. Retrograde amnesia is a defect in memory -- fancy word for forgetfulness, amnesia. Retrograde amnesia and antegrade amnesia, we talk about those two with head injuries, severe blow to the head. The more prominent of the two is retrograde amnesia, and I need to define retrograde amnesia.

Retrograde amnesia is from the point of the incident to before -- before the point of the incident and

including it. Antegrade amnesia is after. A boxer that gets punched, hit on the second round and he continues the round, but you talk to him -- he develops head injury, develops concussion -- you talk to him he'll say, I don't remember anything after the second round. This is an antegrade amnesia, after the incident. Retrograde is before. The more prominent of the two in head injury is retrograde amnesia. Retrograde amnesia from the time previously.

How far it goes back? It varies. However, it has one characteristic that every period of time, every once in a while, if he forgets maybe six weeks or eight weeks or a year, he will start recalling and recalling a little bit more and recalling a little bit more up to the time of the incident or a few minutes before that. This is the phenomena of the head injury in relation to the memory. Okay? This week -- you can't localize it anatomically; that's why I'm separating it.

Q Okay.

A All right. The disturbance in memory, that's what you are interested in, anatomical disturbance in memory or diseases that have anatomical disturbance of memory; do I understand you right?

Q Yes, sir. That's another type?

A Okay. The areas of the brain that are primarily concerned with the memory is the temporal lobe and the hippocampus and the fornix and the mamillary body. I'll explain what they

are.

Q Thank you.

A We talked about the, uh, limbic lobe and the temporal lesion, again, inside, in the middle, around the third lateral ventricle. Okay?

Q Go ahead, sir. You're doing good.

A Okay. This has -- these are the areas that has to do with the memory. Diseases that involve this shows defects in memory. We talk about Korsakoff's syndrome, a disease in alcoholics where they have -- they lose their memory; they have difficulty in their retention. You remember we talked about registration, retention and recall. Tell them five; they say immediately to you, five; if you wait a few minutes and come back, they don't remember. However, there is another characteristic they do; they fill in; they say, "You told me six." Confabulation.

These people with Korsakoff's syndrome on autopsy -- they have lesions in the fornix, which is the area that goes from the hippocampus, swings in the middle between the two sides of the brain, goes down to the area of the hypothalamus, in the base of the hypothalamus is a small area like a small ball called the mamillary body. These are the areas that you see spotted degeneration in it in Korsakoff's syndrome.

Q Based on your examination and from the records you have, is any of this present in Mr. Rector?

A There is no reason to assume it; there is no reason

to -- what we do is certainly unique. What you need in an evaluation, you're talking about -- we're talking about my interview with him. My interview with him was just for the purpose of diagnosis, for the purpose of diagnosis. We look for symptoms. Symptoms is what the patient tells you. Signs is what you observe. In psychiatry you don't have too many signs, but when somebody tells me -- I have a frontal lobe -- there is a frontal lobe syndrome, there are signs. There are characteristic signs. Incontinence is a very common characteristic. This does not occur. Disturbance in gait; you see him, how he walks, and this was not the case. Uh, certain characteristic reflexes are characteristic of the frontal lobe syndrome. Grasp reflex, when you give him a pencil to, uh, to write with, grasp it like a little child. Grasp reflex is a characteristic of the frontal lobe. You don't see any of that.

So, not only do you say, okay, it doesn't exist, he's already had a neurology evaluation. You observe him; you discuss -- you talk to him; you see how he interacts; you do a mental status examination after you do a review of the history. A mental status examination involves all the, uh, the factors that will give you a functional evaluation of his psychiatric status or his behavioral status.

Q Now, doctor, based on all this, you reached a conclusion as to his competency, did you not?

A Yes, I did.

Q And what was that conclusion?

A That he is competent to stand trial.

Q Does that conclusion also reach his competence to assist in his own defense?

A Yes, sir.

Q And what was your conclusion in that area?

A That he is capable to cooperate with his attorney should he decide to.

Q You were in the courtroom this morning when Dr. Brown testified?

A Yes, sir.

Q And based on what you've just told us, your opinion varies from his. Is that correct?

A Yes, sir. My opinion -- yes. My opinion based on anatomical psychiatric evaluation, I feel that I have paid attention to all the possible anatomical, pathological causes underlying any limitation in his behavior, not only memory, any limitation in his behavior and cognitive capabilities.

Uh, I feel that he has the ability for rational understanding -- rational and factual understanding at the present time or at the time I examined him I should have said since I have not examined him since then.

Q And you are a medical doctor?

A Yes, sir.

Q Doctor, just one question, we're not talking about

a degree of competence that would allow this man to enroll in Harvard Medical School or anything like that, are we?

A No, I don't think we are or a -- uh, it is not -- I mean, I do not see -- we do -- we prescribe -- I have worked at the state hospital which is a forensic unit for southern California, and we have been in the habit of, uh, using tests for people considered incompetent, they come to us after the evaluation for the treatment. And we give them tests before and, then, one month -- one of the criteria of their improvement is to review their ability to respond on that test, and the tests certainly have to be simple, have to be on a non-complicated level. It is not a college admission exam, can't be.

MR. CLAWSON: I think that's all the questions I have at this time.

CROSS EXAMINATION

BY MR. MILLER:

Q When you examined him on 5/22 --

A Five twenty-two? Five twenty-one was the last examination.

Q Okay. When you examined him on 5/21 --

A Yes, sir.

Q -- did you know he was retarded?

A Yes.

Q Did you know that he was mentally retarded?

A Yes. Yes. I knew -- well, part of my examination

is to estimate his intellectual capacity.

Q Fine. So, you knew that he was --

A And I felt that he was limited as far as his intellectual capacity. I would have needed -- I did not know on 5/1 that he was mentally retarded, and between 5/1 and 5/20, I was able to get a score on him.

Q So, you had a score on him --

A Yes, sir.

Q -- by 5/20, and you knew at that time that he was mentally retarded?

A He was -- yes.

Q I'd like to read to you from page two of the psychiatric report -- your psychiatric report --

A Sure.

Q -- bottom -- next to the last sentence. "His intellectual capacity is considered to be average."

A Well --

Q Well, is he --

A This is my own assessment.

Q Now, wait a second, doctor --

A No --

Q Wait, doctor.

A Okay.

Q You just told me that by the time you examined him --

A Sure.

Q -- you had his report and you knew that he was retarded.

A That does not mean I will change my impression had I not gotten the report.

Q Okay. So, even though you knew he was retarded, you felt he wasn't retarded. Is that what you're saying?

A No. That by my own assessment. I felt that he was of an average intellectual capacity.

Q By your own assessment --

A Yes.

Q -- you felt he wasn't retarded?

A Yes.

Q Okay. Now, you describe the testing procedure that you use primarily by sitting and talking; right?

A No.

Q I'm sorry.

A As a psychiatric evaluation.

Q Yes. But that is primarily --

A Yeah. No talking. That includes his neurological responses --

Q I'm talking about --

A -- his behavior, his, uh, how he moves.

Q Fine. But basically what it is it's observing him, it's interacting with him.

A Sure. Yes, it is.

Q It is talking to him --

A Yes, it is.

Q -- listening to him --

A And observing him. Yes.

Q All right. It's not any written tests or anything, is it?

A No.

Q So, it's just you and he talking, watching him walk, watching him talk, whatever, and it's your own subjective observations.

A No, sir, not subjective.

Q Not subjective?

A No, sir. When a person has gait disturbance or absence of gait disturbance, that is not subjective. He is walking -- can take a small wide gait, then he probably has syphilis; can walk with a small gait, he does not; if he has a stepping stone -- I can tell you twenty diseases by the way he walks.

Q Fine. Okay.

A It is -- we are not visiting like neighbors. I'm acting like a doctor that is trained to observe signs and symptoms.

Q Okay. That's fine. I have no problem with that.

A I think you do.

Q Yet there are some subjective statements here.

A Huh?

Q For example, you say that he tended to be evasive.

A Yes.

Q All right. Is that a subjective statement?

A I had started in my definition to state that in the process of evaluation we talk about symptoms and we talk about signs. Symptoms are by nature subjective and signs are objective. There are subjective parts and there are objective parts to any examination, yes.

Q All right. But you say he tended to be evasive.

A Yes.

Q Now, I would suggest -- and then you, also, say that at the time you did this, you didn't think he was retarded; you thought he had average intelligence. Right?

A You are talking about the difference of two to three degrees. You are not talking about the difference of intelligence --

Q No, I'm --

A -- and you are talking about the difference -- let me explain to you what retarded -- what mentally retarded is.

Q I'm simply reading --

A We're talking about an intellectual capacity.

Q I'm --

A His intellectual capacity markedly impaired or is his intellectual capacity such that he can interact.

Q Now, let's talk about --

A I'm saying that he can interact. I'm not talking about figures.

Q Well, let's talk about figures, okay? Now, I know, as do most people of any education, that the average intelligence is approximately one hundred; is that correct?

A Well, that's what you know.

Q Well, is that correct?

A It could be.

Q Is it or isn't it?

A It depends on the educational background and the social background. There is a lot of factors if you want to use figures.

Q Well, I know --

A Yeah.

Q What I'm trying to get at, doctor, is you say in your report --

A Yes.

Q -- his intelligence capacity is considered to be average.

A Average. Within the average group, yes.

Q And yet, your own psychologist, Dr. Mallory, says that he is retarded. Right?

A He said his I.Q. is 60.

Q Which is retarded.

A Yes.

Q Okay. But what I'm trying to clarify in my own mind, sir, is that when you ask a person a question, their response is based in part upon your assessment of their intelligence. Let me follow this up so I can make it perfectly clear. If you say to me, "What do you think of so and so?" and you think that I'm of average intelligence, and I just sit back and I kind of say, "Well, I don't know." If you think I'm of average intelligence, you could think I was being evasive, but if I was retarded, you wouldn't think I was being evasive. Isn't that correct?

A (No verbal response.)

Q It's not correct?

A If you avoid the point I'm asking you about -- if I ask you a question and you prefer not to address yourself to that question --

Q How do you know whether --

A -- you tend to be evasive.

Q -- I prefer or not prefer?

A Because by the nature and directness of the question.

Q And by the nature of my understanding of the question.

A If you were talking about food and you do not discuss it, you are avoiding the issue.

Q What about my understanding --

A Little children can be evasive. You do not need to have intelligence to be evasive.

Q What about my understanding of the question? If I do not understand the question --

A It is my -- my function to determine whether the person can understand the question or not.

Q And you thought that his intellectual capacity was average. You didn't think that he was retarded.

A I continue to think that he's average. I'm not changing my mind.

Q Fine. However, your own psychologist tested him and found him to be retarded, as did every other psychologist here. Okay, let's ask you another question here. I understand that you had a Dr. Holzhauer examine him; is that correct?

A Holzhauer was the doctor doing the physical examinations, routine physical examinations on all the, uh, people that come in.

Q Pretty complete surgery -- pretty complete examination?

A No. These were routine examination done for the purpose of records. It's not a consultation type; this is a capacity of less than an intern.

Q Okay. Reason why I asked was because in looking at the medical history, when it comes down to the word "did he receive surgery," Dr. Holzhauer says, no, no surgery.

A Well, Dr. Holzhauer was a trainee. And in any teaching institution there are those situations --

Q Okay. So you had a trainee --

A -- and you cannot teach if you do not permit -- yes.

Q So you had an inexperienced trainee --

A I have not referred to Dr. Holzhauer as one of the group that has done the work.

Q But he did a medical report which you relied on.

A No, I did not rely on that report.

Q You did not rely on that report?

A Not on his report. That was a routine -- that was to satisfy the requirements.

Q Why have Rector examined if it's by an amateur.

A He was examined by a neurologist, if you recall.

Q Well, I'm just reading the notes and it says no surgery. Dr. Holzhauer looked at Rector with the scars on his head and said no surgery.

A That is for Dr. Holzhauer to answer.

Q But the point I'm making is that among other things you have testified --

A Yes.

Q -- and so has Dr. Mallory testified that you work as a team. You all rely on each other.

A I have not said that.

Q Oh. Do you rely --

A I have said that my decision about his capacities and so on, we -- we planned his out -- I planned the needed studies for his evaluation based on my original assessment of the case, what is needed for him. The team -- Dr. Drummond was brought from the University of Arkansas; the neurologist -- we went to the neurologist to evaluate him.

Q All right. You've already testified to this.

A It is a team in the indirect concept. Team and where -- whoever is needed for the evaluations, his services will be procured.

Q Okay. But you do, in order to reach your conclusions, rely on each other's interactions; is that right? You rely on what Dr. Drummond says, I mean, you were the one who finally wrote out and sent to the Court and sent to us a statement that Ricky Rector is competent.

A Uh-huh.

Q And you come to that conclusion by looking at Dr. Mallory's report, by looking at Dr. Drummond's report, by looking at -- by looking at the statements made by the staff who see him every day. You use all that information to reach your conclusion.

A No, that is incorrect.

Q What do you base -- you base --

A On a staffing conference, Mr. Miller, where there is an interaction of the facts, where the different opinions are

presented, are discussed, are objected to, if there is need for an objection, or disagreed with if there is a need for disagreement. Uh, the conclusion is based on the general discussion and the general input of the people in the staffing conference. I do not sit down and compose from this and this and this.

Q Well, I think we're both talking about the same thing. What's a little confusing to me, sir, is this: on 5/22 you said that, "based on my evaluation --

A Yes.

Q "-- Ricky Rector is competent " That's 5/22.

A Yes.

Q At that time, of course, you thought that he was not mentally retarded, and you still don't think he is.

A On 5/22?

Q Yeah. You didn't think he was mentally retarded then.

A I didn't think the mental retardation is an issue that will have a bearing on his competency to stand trial as determined by the case law.

Q Fact is, you didn't even know whether he was retarded --

A Sure, I did. It was discussed with the staffing conference. The letter does not go out --

Q The staffing conference was after 5/22.

A Is this the letter that you have received?

Q I have in front of me the psychiatric history and mental status that you signed dated 5/22.

A Yes.

Q Now, the staffing conference occurred afterwards.

A The staffing conference occurred afterwards, yes.

Q As did Dr. Mallory's evaluation. When you came to the decision that Ricky Rector was incompetent, Mallory hadn't even talked to him yet. Mallory hadn't even examined him yet.

A This is true.

Q So, this is not based on anything other than your own personal feelings based on your --

A Not my own personal -- my own personal evaluation, not feelings.

Q Sorry, evaluation.

A Yes.

Q But not on the evaluation of anybody else?

A After the staff conference, the opinion that well represents the group interaction and the input --

Q I'm not arguing with you --

A Yeah.

Q -- I'm trying to get some dates straight.

A Yes.

Q We have here a psychiatric history and mental status --

A Yes.

Q -- signed by you --

A Yes.

Q -- based on the examinations that you did up to and including 5/21.

A Yes.

Q Now, you came to certain conclusions and these were the conclusions that were adopted by your department --

A Mr. Miller, let me explain to you how the thing works so you'll understand. I have --

Q I understand, sir.

A No. I have stated before that a person is, uh, not competent to stand trial and when we sit in the staffing, other people came in with input. And after we received the input of everybody, we can change as a total interaction group, we can change our opinion, and then you get the letter that is signed by me or the hospital or the institution -- get the letter that is signed by me or by the examining physician and then approved by myself after the conference.

Q Right. However, getting back to what I've been trying to clarify --

A Yes.

Q -- and still have not been able to clarify --

A Yes.

Q -- on 5/22 --

A Yes.

Q -- you determined that, quote, "He should be able

to cooperate with his attorney --

A Yes.

Q "-- and he is competent to stand trial."

A Yes.

Q That was on 5/22.

A Yes.

Q Now, this conclusion you reached -- which is word for word the same conclusion you reached two weeks later and sent to the Court --

A Yes.

Q -- this same conclusion was based on no other examinations. In other words, it was not based on any input from Dr. Mallory; is that correct?

A Sure it was.

Q Well, how could it have been if the first time Dr. Mallory saw Rector was after you had already made --

A Because everybody goes to the conference with their opinions, and then --

Q But, sir --

A -- we discuss an exchange of opinions and then we make a letter -- would you please -- is the copy of the letter available?

Q Sir, we have --

MR. CLAWSON: Your Honor, I'm going to object to this. He's been over it about four times now; he's arguing with

the witness. He has explained to him the basis for this thing he has in his hand, how the staffing is held afterward and the other opinions are offered. I think it's been explained, and I think Mr. Miller should quit asking about it.

MR. MILLER: Well, your Honor, that's right, I am arguing, and the reason why I'm arguing is because I cannot conceive of how a evaluation dated 5/22 could be based on information that didn't even come into existence until 5/26. But I'll move on.

Q Sir, let me ask you something about Dr. Arthur's evaluation, the surgical report.

A Uh-huh.

Q Well, first of all, you're a doctor, you know about these things. Would you please tell me where the sphenoid ridges are.

A The sphenoid ridges --

Q Uh-huh.

A -- are down on the base of the skull.

Q Would you please point to it on your own head?

A Right here.

Q So from down here this way --

A Yes.

Q -- are the sphenoid ridges.

A Yes.

Q Right like that.

A Yes.

Q I'd like to read to you Dr. Arthur's report.

A Sure.

Q "Frontal lobe tissue was removed approximately back to the sphenoid ridges bilaterally before normal viable brain was identified." Now, you've just testified that the sphenoid ridge is approximately here. Right?

A (No verbal response.)

Q And Dr. Arthur has said, "I have removed tissue from the front all the way back to the sphenoid ridge until I came to viable tissue." Is that right?

A And he would consider that three and a half to four centimeters?

Q I'm just reading what the surgeon wrote.

A I'm reading what it says here, too.

Q Sir, I'm just reading what the surgeon wrote.

A The surgeon is describing how far he went. If he had removed that much, the loss of tissue would have resulted in a much different picture from -- different point of view.

Q Are you saying that the surgical report is in error?

A No, I'm not. I'm suggesting that the report here -- he's describing a general description. When he got to the exact amount he removed, he said, "the anterior three and a half to four centimeters of the frontal lobes." This is his signature, and this is his discussion with me on the telephone.

Q But, again, I am simply reading -- and I will enter into the record a copy of the surgical report as exhibit number three -- and the surgical report says -- it's a very detailed report; it talks about the kind of knives he used to do the cutting; it talks about the scalp incision, said he used a number ten blade. I mean, this isn't just a brief little number; this is a very complex medical statement as to the surgery he performed.

And he says, in his very specific words, "Frontal lobe tissue was removed approximately back to the sphenoid ridges bilaterally," both sides; right? And yet -- and yet you thought that he just had a little bit of tissue missing; is that correct?

A I do not have -- I'm reading what I have in front of me here, and I'm looking at the function that I see of the individual in front of me. He was seen by a neurologist; I am board certified in psychiatry and neurology, and I see an individual in front of me that couldn't possibly have that much tissue loss and maintain this function.

Q Well, again, I can only read the --

A And I do not need to prove anything that needed to be proven.

Q So in other words, what you're saying is that your findings are different than what the surgeon says he cut out?

A No. I have -- the communication, the writing might

not be clear to you.

Q It's very clear. "Frontal lobe tissue was removed approximately back to the sphenoid ridges bilaterally."

A I have a statement here that tells me how much he's taken out that makes more sense to me. Three and a half to four centimeters of the frontal lobe. That's compatible of the clinical picture I see on this young man.

Q So, basically, you're saying, or at least we have found out that -- again, I'm just trying to put this whole thing together. What about the bullet fragments in the frontal lobe? Did you know about those bullet fragments?

A I read the report; I read the history.

Q When did you read the report?

A Hum?

Q When did you read the report?

A The -- the operative report I read it today because it was not available. I requested the chart, and the parts that they have sent me is incorporated in this chart of this -- of his hospitalization. It has a progress note description of that they have done.

Q But you didn't read the operative report until today?

A Yeah.

Q You didn't read it when you examined him.

A I communicated with Dr. Arthur.

Q You mean you didn't even go to the trouble --

A I requested it. It was not forwarded to me.

Q It's in the same institution as yours.

A They have failed to forward it. I have the copies of the hospitalization here in front of me and the record that they have sent did not include the operative report. However, in order to avoid any misjudgment, I communicated with Dr. Arthur, and I had the young man seen by a neurologist, both -- both possibilities.

Q Wouldn't it have been easier simply to get the surgical report?

A Yes. What a question. But they are back -- they are behind in dictating it, Mr. Miller.

Q There was no problem for me to get the surgical report.

A Because you ordered it last week or the week before, yes.

Q No. This is dated 3/21/81 --

A I have requested the records --

Q -- that's March 21st.

A -- all the records of the hospitalization. They have not been --

MR. BRAZIL: Mr. Miller very well knows we didn't get it until today ourselves, and he didn't either.

MR. MILLER: No, that's not quite accurate.

MR. BRAZIL: Then you promised it to us sooner than you let us have it.

Q So, what you're saying essentially, is that you did all the examinations of Ricky Rector, kept him there for thirty days and you didn't even see the surgical report?

A I discussed it with the operative surgeon.

Q So, you knew about the bullet fragments in his frontal lobes, did you not?

A I know, and I know about --

Q Did you know --

A -- the estimation of the loss from Dr. Arthur as well. You don't want me to relate it, that is your prerogative.

Q Did you know at the time you examined him about the bullet fragments and bone fragments that were left in his brain? Did you know about it?

A Well, what do you think Dr. Arthur was discussing when I talked to him on the telephone?

Q Well --

A We did not discuss how to make a cup of coffee; we discussed what was going on.

Q Please answer the question.

A Yeah.

Q Did you know about the bullet fragments and the bone fragments in his frontal lobe?

A He explained to me what the procedure was, what the

expected complications are, and what the loss of tissue was.

Q Did you know that fiber tracts pertaining to both the suction of -- I'm sorry -- the suction -- I'm sorry. That fibrous material between the part of the brain that was removed and the rest of the brain hai been severed. Did you know that?

A Where are you referring to?

Q I'm just asking you if you knew.

A Where are you -- well, I have to reinterpret what you're saying. What are you referring to here?

A Are there fibrous connections between the frontal lobe and the rest of the brain?

A None.

Q None at all?

A None. Absolutely none. This is an incorrect statement. I have a book of anatomy with me here. There is no such thing as fibrous connection in the brain tissue.

Q Okay.

A And I will be quoted at whatever expense there is, this is one of the characteristics. You flunk your anatomy if you say that.

Q I'm not a physician --

A I taught anatomy, sir. I taught neuroanatomy. Don't discuss the issue with me when I have the book right here.

Q Sir, if you don't want to --

A And I didn't bring it especially to answer your

question.

Q You certainly don't --

A I don't -- we do not guess.

Q Doctor --

THE WITNESS: Your Honor, this is the book of anatomy here with me.

Q Doctor, I must admit that I'm simple minded, but I --

A Yes.

Q -- cannot understand -- if the word is not fibrous connections, if there's another word, let me ask you, are there any kind of nerve connections or neuro-connections?

A Neural tracts, not fiber.

Q Neural tracts. So there are connections, neural tracts, between the front of the brain and the rest of the brain; is that correct?

A Between all the brain there are connections.

Q Now, if a bullet enters here and cuts through there, is it going to sever any of those connections?

A Which connection are you talking about?

Q Any connection.

A You -- you need to see what we -- what the pictures are where the location of the --

Q I just want to know, sir --

A -- let me show you one picture here so you'll get an impression how to evaluate. There are two forms of fibers,

associated fibers that go from one convolution to another convolution, and these do not --

Q Excuse me. You just told me, sir, that there were no fibers.

A Nerve fibers. Nerve.

Q Didn't you just say there were no fibrous connections, no fibers?

A No fibrous tissue. Fiber and fibrous tissue are different. I stay out of law. You stay out of anatomy. It's better for you.

Q I'm beginning to believe that.

A Yeah.

Q But, sir, you are in law --

A That's right.

Q -- and I'm afraid I'm in anatomy --

A Okay.

Q -- so we have to find, at least, a common language.

A Sure. But you do not want to wait for me to explain to you.

Q When I'm talking about fibrous connections or fibrous nerve tissue --

A These are short -- short connections between the convolutions.

Q Okay. Now, if a bullet enters here and ends up there, and this much --

A You put it there yourself. I don't agree with that.

Q Well, if a bullet enters any part of the brain --

A Yeah.

Q -- and exits another part of the brain --

A Yeah.

Q -- and a portion of the brain is removed, are any of these fibrous connections, fibrous tissue, nerve fibers, whatever you call them, are they severed?

A Depends on the specific area, some of them might be, some of them may not be, but not to the degree of lobotomy you're talking about.

Q Okay. Let me ask you a little bit about his memory.

A Sure.

Q You spent a lot of time talking --

A Not specifically to memory, no, sir. I spent a lot of time giving him psychiatric evaluation.

Q No, I'm saying here in this courtroom you've spent a lot of time talking about --

A Describing what memory is because everybody was guessing on memory. They are -- nobody had differentiated between, uh, the memory that comes with injury and memory that comes with anatomical changes.

Q Okay, so we have retrograde memory --

A Retrograde amnesia, sir.

Q -- or retrograde amnesia and anterograde amnesia; is

that correct?

A Uh-huh.

Q And you said -- if I get it correctly -- the retrograde amnesia has to do in terms of time from the point of injury in time --

A The point of accident.

Q Yeah. The point of accident back?

A Uh-huh.

Q Back in time.

A Uh-huh.

Q And the anterograde amensia has to do with the point of injury forward?

A Yes.

Q And I understood you to say that the most common form of amnesia was retrograde.

A No, in head injury.

Q In head injuries.

A In head injury you see more retrograde than anterograde.

Q And here we have Mr. Rector who, there is no question, had a head injury; right?

A (No verbal response.)

Q We agree on that.

A (No response.)

Q And Mr. Rector contends that he has no memory of the

events from the time he was injured back.

A Until when?

Q Until sometime prior to the first alleged crime.

A Just exactly the date or the hour or -- when?

Q No, not the date or the hour --

A I have attempted to work this to find out. There has not been any reports about retrograde; this is why I try to characterize -- you try to look at symptoms, and after you look at symptoms, you look at signs, and then you look at syndromes. We talk about characteristic features of disease. A person who had hallucination alone is not schizophrenic. He has hallucination; he has this; he has this; I can name it to you, and then we say this person is schizophrenic. I try to characterize these memory changes.

MR. MILLER: Your Honor, would you please ask Dr. Hamed -- I don't mean to be in any way unrespectful, sir, but we need to stay focused on answering the question and not a general understanding of the full body of knowledge.

THE WITNESS: Back to law. Right.

THE COURT: Try to answer the questions concisely.

THE WITNESS: Okay. Back to law. Okay.

Q Is it possible, based on Mr. Rector's injury, that he suffered from retrograde amnesia?

A It could be.

Q Do you know whether he did or not?

A No, I am not impressed that he did.

Q Do you know that he didn't?

A I know that he did not.

Q You think he's lying when he says he doesn't remember?

A I am inclined to think so.

Q How many patients do you have at Rogers Hall?

A You mean the statistics at Rogers Hall?

Q No. I just want to know the number of people that are there now.

A Eighty-two bed under full capacity. Maybe we have two beds empty, maybe not today.

Q About eighty people?

A Uh-huh.

Q And you spend time with a lot of them; is that correct?

A No. There is two doctors with me.

Q So, about half of them are your patients?

A No.

Q You say there are two doctors?

A There are three of us.

Q So, about a third of them are your patients?

A Um, possibly.

Q About twenty-five.

A Uh-huh.

Q Is that a heavy load or a light load?

A It is average.

Q You're not overworked, are you?

A For other reasons, but this is -- not for the total -- for the work of the assignment that they have, no.

Q Okay. I guess I'm still trying to find out if someone -- well, I guess for clarification, if we had so much information in front of us, I would like to briefly figure out what -- okay, Robert somebody, the --

A Watson.

Q Watson?

A The neurology report?

Q I couldn't read his name.

A Yes.

Q He says that -- now, did Dr. Watson consult with the surgical report?

A No.

Q He didn't?

A No. We referred him to the surgeon and he's aware of the surgical intervention.

Q I see. But he didn't consult the report?

A No, he did not.

Q And yet, even though he didn't know the amount of the surgery, he says, quote, "Fortunately this man was shot through a so-called 'silent area' and though the bullet seems to have passed from right to left throughout the skull, it

fortunately shows evidence of very little physical damage."

A Uh-huh.

Q Very little physical damage. And yet, the man who did the cutting, if I may come down to common language, says that the frontal lobe tissue was removed back to the sphenoid ridges.

A I cannot agree with you. I cannot possibly see him --

Q I can only --

A We have to use our common sense with these things.

Q I am using the most common --

A You are hanging on something even -- I'm sorry to divert, your Honor.

THE COURT: Go ahead. You can explain your answer.

THE WITNESS: You are -- you are talking about something impossible. You talk about functions of the brain. There is over here you have the eye gaze area; you have -- people with this much involvement will have trouble with their conjugate eye movement. You can tell by looking at them they have trouble with their gait; they have trouble with grasp reflex. And I see here a letter in front of me that makes -- that is more compatible, more specific, your Honor, that says the amount of tissue that was removed.

THE COURT: What is this letter?

THE WITNESS: From Dr. Arthur.

MR. BRAZIL: A letter from the surgeon.

THE COURT: Well, before I look at it, if it should be introduced, let's introduce it.

MR. BRAZIL: We'd like for it to be introduced, your Honor, and marked. It's a letter to Mr. Miller, by the way.

THE WITNESS: May I make a comment, your Honor?

MR. MILLER: Your Honor, may we --

THE COURT: Mr. Prosecutor, he's your witness, do you want him to make a brief statement?

MR. BRAZIL: That's fine with me.

MR. HELLER: We object, your Honor.

MR. MILLER: Your Honor, we're not finished with the cross-examination.

THE WITNESS: Yes, to clarify the issue. You want some clarification. The concept of diagnosis in medicine has to start with the assumption of individuality. You can't diagnose unless you are yourself convinced with what you see adds up, you should not believe it. Now, we are talking here about overlapping this with the concept of credibility.

But, if somebody comes to me and tells me half of my brain is off, and I don't -- I can't confirm it myself, I will not believe it; I will not agree to it.

Q And it's obvious, sir --

A Yeah.

Q -- that no matter what the neurosurgeon says, you will still use your own analysis and give that greater credence.

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A No, not give it a greater credence, but I will look into it; I will verify it with the proper method. There are X rays; there is a brain scan, and there is a computerized axiotomography that can tell you exactly how much millimeters has been taken out. That's what I would do.

Q Did you do that?

A No. It was not needed.

Q So, even though you would do that, you didn't do it?

A Because his function -- he is functioning adequately and I have the report -- I discussed it with the surgeon; I trust what he tells me on the telephone --

Q Well, all I can say --

A I communicated, sir.

Q All I'm trying to understand, when the doctor -- the doctor performed surgery.

A Uh-huh.

Q And that same day, the same day after his hands are washed, he, then, goes to his office and dictates a surgical report --

MR. BRAZIL: Your Honor, he's gone over that at least fifteen times. It's --

MR. MILLER: Because, your Honor --

MR. BRAZIL: -- argumentative and he's explained --

MR. MILLER: Your Honor --

MR. BRAZIL: -- it and he's answered -- if you'll

A50

let me finish -- and he's gone over it so many times that I can tell you from memory what he said.

THE COURT: Dr. Arthur was the doctor who performed the operation, was he not?

MR. MILLER: Yes, he was.

THE COURT: Do you not consider this to be, also, a part of his medical report?

MR. MILLER: As part of his medical, yes, I do.

MR. BRAZIL: The witness said he's talked to the man.

MR. MILLER: I have no --

MR. BRAZIL: That's all he can go over. He can't answer it but one time.

MR. MILLER: I have no problems with that. I think that those two reports are consistent -- if I might have this copy back -- this is specifically the surgical report dictated the day of the operation.

MR. BRAZIL: Your Honor, it's obvious he's not going to get Dr. Hamed to change his mind, and so I think we ought to get off of it and go on to something else.

MR. MILLER: I think you're right. I think I'm --

MR. BRAZIL: Then go on to something else.

MR. MILLER: -- I think I'm not going to get Dr. Hamed to change his mind. I think that Dr. Hamed is married to his opinion, as he has been from the very beginning notwithstanding medical reports to the contrary, reports by his own

doctors, reports by anybody else. Dr. Hamed decided the man is competent and sticks to it.

THE COURT: Mr. Miller, on one instance the doctor says that he's removed materials back to these particular ridges, in this report he says he has removed three and a half to four centimeters.

MR. MILLER: Yes, your Honor, and three and a half to four centimeters is approximately two inches, which is approximately back to the sphenoid ridge. So they're not inconsistent. I'm just trying to make the Court aware of the fact that a significant portion of brain tissue, according to the physician was removed.

(The surgical report was marked as Appendix C and attached at page 661.)

(The letter from Dr. Arthur was marked Appendix D and attached at page 662.)

THE COURT: By the way, that was an exhibit you have. Don't put it back in your file.

Q So, we just can't understand why the good doctor here won't agree with the surgical report. Hold on one moment, please.

One last question, if somebody has had -- what's the word -- retrograde amnesia, can they recover?

A Yes, characteristically.

Q So, it's entirely possible if Mr. Rector --

A He would have recovered. This has occurred on March 23 -- March 24, 1981, and now we are talking about, uh, five months. I would have expected to see some recovery.

Q But some people take longer to recover, don't they?

A I, uh, am not -- people vary, but I'm not -- there is no such thing as absolute rule, but I'm not aware -- we're talking about terms of four weeks, six weeks, eight weeks, ten weeks in the average motorcycle accident and car accident.

Q People don't have amnesia --

A However -- huh?

Q People don't have retrograde amnesia that lasts a year or two years?

A I'm talking about head injury.

Q Yeah. They don't have --

A You talking about electric shocks or repeated electric shocks or are you talking about --

Q No, I'm talking about head injury.

A Well, the duration --

Q The severity of the injury --

A -- the duration back is not the point. The recovery -- the recovery is characteristically in less time than that, but I see no recovery whatsoever and --

Q But you see no recovery; is that correct?

A I -- I -- as of May and as of what was described in front of me today and what you are relating to me, you are

relating that there has not been any changes.

THE COURT: Anything further?

MR. CLAWSON: Just a couple of questions.

REDIRECT EXAMINATION

BY MR. CLAWSON:

Q Doctor, what has been referred to here as the highly specific surgical report makes the reference that the brain tissue was removed approximately to the sphenoid ridge?

A Uh-huh.

Q Approximately.

A Uh-huh.

Q This letter says exactly how much was taken, three and a half to four centimeters; right?

A (No verbal response.)

Q Had the brain been excised back to the ridge, as pointed out, would the individual with that much brain removal show different symptoms and signs than Mr. Rector has shown to you on your examination?

A Absolutely. Absolutely.

Q Now, one more question. Have you ever in your experience examined people involved and charged with criminal acts who claim to have no memory of the events?

A Yes, sir.

Q Is that unusual?

A No.

FILED A-5
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS
AUG 18 1983
CARL R. BRENTS, CLERK
By: [illegible]
DEP. CLERK

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES T. GRIGSBY — PETITIONER

v. NO. PB-C-78-32

JAMES MABRY, COMMISSIONER,
Arkansas Department of Correction — RESPONDENT

DEWAYNE HULSEY — PETITIONER

v. NO. PB-C-81-2

WILLIS SARGENT, Superintendent of OF
the Cummins Unit Penitentiary,
Grady, Arkansas — RESPONDENT

ARDIA MC CREE — PETITIONER

v. NO. PB-C-80-429

VERNON HOUSEWRIGHT, Director,
Arkansas Department of Correction — RESPONDENT

JUDGMENT

Pursuant to the Memorandum Opinion filed herein on August 5, 1983, and the Memorandum Opinion and Order of even date herewith,

It is hereby Considered, Ordered and Adjudged that the petition of James T. Grigsby be, and it is hereby, dismissed.

It is further Considered, Ordered and Adjudged that the petition of Mr. Dewayne Hulsey be, and it is hereby, dismissed.

It is further Ordered the writ issue in favor of the petitioner McCree conditioned that the State try him within 90 days after the Court of Appeals issues its mandate on respondent's' appeal, or to release him and set him free, with Mr. McCree to remain in the custody of the State of Arkansas until such times as he is either tried or freed pursuant hereto.

Dated this 18th day of August, 1983.

Garnett Thomas Eisele
United States District Judge

AUG 19 1983
ATTORNEY GENERAL'S
OF

A-55

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

AUG 18 1983

CARL R. BRENTS, CLERK
By: _____ DEP. CLERK

AUG 19 1983
ATTORNEY GENERAL'S OFFICE
ARKANSAS

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JAMES T. GRIGSBY — PETITIONER

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JAMES MABRY, Commissioner, Arkansas Department of Correction — RESPONDENT

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v. NO. PB-C-81-2

WILLIS SARGENT, Superintendent of the Cummins Unit Penitentiary, Grady, Arkansas — RESPONDENT

ARDIA MCCREE — PETITIONER

v. NO. PB-C-80-429

VERNON HOUSEWRIGHT, DIRECTOR, Arkansas Department of Correction — RESPONDENT

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Respondents' "Motion for Stay Pending Appeal."

The merits of the death qualification issues appear clear enough.[1] Before elaborate and exhaustive attention is given to one of the possible penalties, death, the focus should be upon fairly determining if the defendant in a capital case is or is

[1]The Court's decision of August 5, 1983, holding that death qualified juries are less representative and more guilt-prone than non-death qualified juries does not reflect in any way upon the good faith and conscientiousness of jurors chosen to serve on death qualified juries or, indeed, suggest that conviction decisions actually rendered by such juries were necessarily wrong. As pointed out in that opinion, the effects noted operate consequentially only in the closer or more ambiguous cases. That a jury composed only of bank presidents might on a statistical basis be more likely to convict in a burglary case than a jury composed of a fair cross-section of the community is no reflection on the good faith or conscientiousness of either such jury. Indeed the death qualification process reflects adversely and unfairly on only one group — those excluded — by implicitly suggesting that those who strongly oppose the death penalty do not believe that murderers should be convicted and punished. History (note Arkansas history as an example), judicial notice and the evidence in this case demonstrate the untruth and absurdity of such a proposition.

It is a truism of the adversary system that the lawyers will, during the jury selection process, attempt to obtain a jury favorable to their client's interest. It is their duty to do so. Each, within broad limits, may use peremptory challenges in an attempt to obtain that objective. But the decision of August 5, 1983, states that no juror may be systematically excluded by the Court on the basis of a for-cause challenge when there is no "cause" or reason for doing so. The opinion reaffirms the principle of inclusion of all as jurors in capital cases who can fairly try the issues presented upon the basis of the law and the evidence.

not guilty.[2] If, but only if, he is found guilty may broad attention be turned to the selection of jurors who can, fairly to the state and the defendant, consider all penalties (including the penalty of death) prescribed by the State law. Such propositions appear, as a matter of constitutional law, almost self-evident.

The serious and difficult problem arises because of the potential consequences of the Court's ruling. The United States Supreme Court itself may have considered the potential wrenching consequences when it failed to adopt a per se rule in Witherspoon v. Illinois, 391 U.S. 510, back in 1968. By its ruling in that case it invited further study. Although the results of such studies are in, and are overwhelming in the direction of their thrust and in their consistency, this Court now believes they were unnecessary. The Supreme Court should, it is respectfully suggested, have relied upon traditional legal analysis, rather than social science and empirical studies, in adopting a per se rule back in 1968 consistent with established constitutional principles. There is no good or convenient time to correct a broadly-followed unconstitutional practice. Fifteen years after Witherspoon, however, the issues can no longer be avoided despite the turmoil which may result from the delay in coming to grips with those issues.

While, as stated, the merits appear clear to the Court, the State is correct in noting that no other court has yet held death qualification under Witherspoon standards unconstitutional. So very serious and fundamental issues will be presented to the appellate courts by virtue of the State's appeal. And, of course, the outcome cannot be predicted with any degree of assurance.

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[2]This is not a radical or novel principle. The State of Arkansas itself operated under such a principle until at least the late 1950s. And it goes without saying that those non-death-qualified juries sentenced many defendants to death. So even if the State of Arkansas opted to try both the guilt phase and the penalty phase with the same non-death qualified jury it is likely that in many cases it would, as before, succeed in getting such juries to impose the death penalty. But it may, under the Court's ruling, if it wishes, death qualify penalty-phase juries.

The remedy creates the larger problems. If the ruling could be applied only prospectively there would be few problems. But, because the death qualification procedure contaminates the fact-finding function of the jury charged with deciding the guilt-innocence of the defendants in capital cases, the obvious remedy according to traditional constitutional notions is a new trial. This is the remedy this Court, after long consideration and much hesitation, felt compelled to order. But the Eighth Circuit in its Grigsby decision made a point about the appropriate remedy that suggests its great concern also. Of course this Court has held in Hulsey v. Sargent, 550 F. Supp. 179 (E.D. Ark 1981), that the death qualification issues may not be considered unless raised before the trial in State court.[3] If its Hulsey ruling is upheld then that will greatly reduce the number of persons who may ask for a new trial on this ground. Still, it is likely that

[3]This Court has held that Mr. Hulsey failed to raise the issue and therefore cannot raise it now. Mr. Grigsby offered to make an evidentiary showing as suggested in Witherspoon that a death qualified jury would not be representative and also would be guilt prone in comparison with a non-death qualified jury. So Mr. Grigsby clearly raised the issue. Mr. McCree filed a motion in the Circuit Court of Ouachita County which states, inter alia:

> That said statute is unconstitutional in its application, and in violation of the Sixth Amendment to the United States Constitution, in that specifically in this case, death qualification was required of the prospective jurors and "death qualification" as imposed herein violates the defendant's right to a jury which represents a cross-section of the community, excluding those members of the community who are most likely to be merciful and leaves the defendant in the hands of a jury stripped of the group with humane inclinations, and is "prosecution prone", and is therefore not a fair and impartial jury.

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It will be noted that Mr. McCree did not make any offer to prove by evidence that death-qualified juries would not be representative or that they would be guilt prone. So it can be argued that Mr. McCree, too, like Mr. Hulsey, failed to properly raise the issue and, therefore, should be barred from raising it now. In other words, under Witherspoon itself death qualified juries were presumed to meet constitutional standards absent an evidentiary showing to the contrary. This Court has ruled that Mr. McCree did, in an adequate fashion, raise the issue. This conclusion is based upon the stipulation of the parties and upon this Court's further view that a per se rule should be adopted even in the absence of the evidentiary showing invited in Witherspoon. If this view is incorrect, i.e., if this Court's rulings are upheld only upon the basis of the evidentiary proof that establishes that death qualified juries are factually unrepresentative and guilt-prone, then it might further be held that persons like Mr. McCree, who failed to at least make an offer of proof as invited by Witherspoon, did not properly tender the issue in their state court case and therefore are barred from raising it later.

Mr. McCree's right to raise the issues is clear. The State of Arkansas raised no Wainwright v. Sykes issue with respect to Mr. McCree's "Grigsby" claim. Indeed, Mr. McCree and the State stipulated that the resolution of Mr. Grigsby's claim would control Mr. McCree's death qualification challenge. The stipulation, entered into on July 14, 1981, provides that, subject to the right of appeal, "the parties to this action agree to be bound by the Court's decision in Grigsby v. Mabry with respect to the issue relating to the death qualification of his (McCree's) trial jury."

many defendants, particularly those tried in the last five years, may have challenged the death qualification procedures during their trials in state court. So, it is likely that many may be in a position to raise the issue. However, higher courts might, even if they affirm this court's rulings on the underlying issues, -- a proposition which the State contends is most questionable -- decide to give such rulings only a prospective effect. Such a decision would dramatically reduce the problems facing the states, leaving the relatively simple problem of adopting procedures which will permit the states in future trials to provide for the death qualification of those "penalty" juries which are asked by the State to impose the death penalty.[4]

Because of the great State interest in ascertaining what procedures will ultimately be required and because of the great number of potential habeas petitions which could result from, or be affected by, the court's rulings, this Court will grant the State's petition for a stay pending appeal. The State is entitled to adequate time to obtain appellate review unhampered by the necessity of dealing with the problems incident to the possibility of new trials.

The Court's order does not deprive Mr. McCree of any legally compelling cognizable right to be released on bond pending his new trial. The Arkansas Constitution provides that all "[a]ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption great." Art. 2, § 8. It is clear that Mr. McCree's prior conviction for the capital offense would satisfy the state constitutional requirement that the "proof is evident" or that the "presumption is great." Furthermore, the relevant provisions of the Federal rules grant this Court the discretion to deny a petitioner his release pending an appeal of a decision

[4]The Court expresses no opinion that the present statutory law of the State of Arkansas would have to be changed in order to have two completely separate juries, one for the trial of the defendant's guilt-innocence and the other for the penalty phase assuming a conviction were obtained. It is unclear how the State presently handles the situation where one or more of the jurors at the trial of defendant's guilt may die or otherwise be unavailable for the penalty phase.

granting his petition for a writ of habeas corpus. Rule 23(c) of the Federal Rules of Appellate Procedure provides that: "Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon his recognizance, with or without surety, unless the court . . . shall otherwise order." For the reasons expressed in this memorandum, the Court in the exercise of its discretion is, consistent with Arkansas law, ordering "otherwise."

It is therefore ordered that respondents' "Motion for Stay Pending Appeal" be, and it is hereby, granted. Respondents are hereby ordered to retry or to free Mr. McCree within 90 days of the issuance of the mandate from the Eighth Circuit Court of Appeals on the State's appeal of this cause should this Court's decision be affirmed and the relief granted by this Court not be altered or modified by the Eighth Circuit.

Dated this 18th day of August, 1983.

Garnett Thomas Eisele
United States District Judge

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